IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

Case No. 76-6617

RICHARD AUSTIN GREENE

Petitioner

vs.

RAYMOND D. MASSEY, Superintendent
Union Correctional Institution

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Richard Austin Greene respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 26, 1977, affirming the order of the United States District Court for the Middle District of Florida entered February 24, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as Greene v. Massey, 546 F.2d 51 (5th Cir. 1977). The opinion is contained in the appendix commencing on page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered January 26, 1977. This Court has jurisdiction to review the judgment by writ of certiorari as authorized by 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in finding that the double jeopardy clause of the Fifth Amendment of the United States Constitution did not bar retrial of Petitioner for the same offense after an appellate court found that the trial court erred in not directing acquittal for insufficiency of the evidence to prove the commission of that offense.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment V:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

The Constitution of the United States, Amendment XIV, Section I:

". . . No state shall make or enforce any law which shall abridge

the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Richard Austin Greene, along with Joseph Manuel Sosa, was found guilty in a Florida state jury trial in 1965 of murder in the first degree. During that proceeding counsel for Petitioner made a motion for a directed verdict of acquittal and a motion for new trial. Both were denied. Petitioner received the death penalty.

On November 5, 1968, the Florida Supreme Court reversed the conviction. In a per curiam decision, the Florida Supreme Court concluded that:

> [A]fter a careful review of the voluminous evidence here we are of the opinion that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968) (Appendix B).

On remand from the Florida Supreme Court's reversal, Petitioner obtained a transfer of venue for his retrial to the Circuit Court of Orange County, Florida. Petitioner's request for a writ of prohibition based on the contention that his retrial for first degree murder would constitute double jeopardy was denied by the state trial court and, upon appeal of the denial, the appellate court affirmed. Sosa v. Maxwell, 234 So. 2d 690 (2d DCA Fla. 1970). (Appendix C).

Upon retrial, Petitioner was again convicted of first degree murder, but with a recommendation for mercy. Petitioner was sentenced to life imprisonment which he has been serving continuously

to date.

Petitioner appealed to the Fourth District Court of Appeal of Florida on the ground that his retrial for the same offense after the Florida Supreme Court had found the evidence at his first trial insufficient to establish his guilt beyond a reasonable doubt placed him in double jeopardy. The Fourth District Court of Appeal affirmed his conviction. Sosa and Greene v. State, 302 So. 2d 202 (4th DCA Fla. 1974). (Appendix D). A petition for a writ of certiorari reiterating the double jeopardy claim was denied by the United States Supreme Court. Greene v. Florida, 421 U.S. 932 (1975).

Thereafter, Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, urging that the Double Jeopardy Clause bars retrial once a conviction for the same offense is reversed because the trial court erred in not granting acquittal due to insufficient evidence. In its February, 1976, order, the District Court intimated that absent prior precedent in the Fifth Circuit it might have granted Petitioner's request. However, constrained by precedent of Fifth Circuit opinions, the District Court denied the writ.

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §2253. The denial of the writ was affirmed because in addition to his motion for acquittal Petitioner had moved for a new trial. Greene v. Massey, 546 F.2d 51 (5th Cir. 1977). (Appendix A). The Circuit Court further based its belief that retrial was proper in this case because the federal circuit courts have the power to reverse for retrial in such cases pursuant to 28 U.S.C. §2106 and the Florida Supreme Court has similar power of review.

REASONS FOR GRANTING THE WRIT

1. THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN ACCORD WITH OPINIONS OF THE SUPREME COURT.

Petitioner, Richard Austin Greene, in 1965, was convicted of first degree murder. On appeal, the Florida Supreme Court overturned that conviction on its finding that the State had presented insufficient evidence to establish defendant's guilt beyond a reasonable doubt. Sosa v. State, 215 So. 2d 736, 737 (Appendix B). However, in its per curiam opinion, the court remanded for a new trial for the same offense, and it is this eventuality that gives rise to the double jeopardy claim.

That Petitioner was entitled to an order of acquittal by the trial judge is stated in language that could not have plainer meaning:

> After a careful review of the voluminous evidence here we are of a view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968) (Emphasis added).

When the Florida Supreme Court held the evidence to be insufficient to convict as a matter of law, it established that the trial court erred in failing to acquit. If the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial for the same offense. There should be no difference when an appellate court, correcting the injustice by ruling as the trial judge should have ruled, orders a judgment of acquittal for lack of evidence. Sapir v. United States, 348 U.S. 373, 374 (1955) (per curiam) (Douglas, J., concurring).

Having decided that the evidence is insufficient to convict, an appellate court cannot remand for a new trial under the rationale that justice is thereby served without violating the plain justice that logic and the double jeopardy clause demand. Mere citation of a rule of procedure or statute will not justify retrial when the United States Constitution is thereby contravened. However, the court below reasoned that the decisions of the Supreme Court establish that the federal circuit courts have

the power under 28 U.S.C. §2106, to remand for a new trial after finding that the evidence was insufficient to convict. Greene v. Massey, 546 F.2d 51, 55 (5th Cir. 1977). (Appendix A-5). The Court further reasoned that under Florida Statute §924.32 the Florida Supreme Court had similar power to remand Petitioner's case for retrial. Id. at 56 (Appendix A-6).

The Court below clarifies that it relies, for its opinion, on a trilogy of Supreme Court decisions: Bryan v. United States, 338 U.S. 552 (1950); Sapir v. United States, 348 U.S. 373 (1955) and Forman v. United States, 361 U.S. 416 (1960). The distinction among these cases, the Circuit Court opined, turns upon whether the defendant made a motion for a new trial in the trial court. Id. at 55 (Appendix A-5).

A defendant who obtains from the trial judge the directed verdict of acquittal to which he is entitled because of insufficient evidence cannot be retried for the same offense. Green v. United States, 355 U.S. 184 (1957). It is incongruous and illogical that a defendant who obtains from an appellate court a reversal of his conviction due to insufficient evidence to convict can be retried. The reason for reversal is identical to the reason for the directed verdict: the prosecution failed to present sufficient evidence to prove the crime charged. What this amounts to is that when a trial court errs in not granting an acquittal the defendant can be subjected to retrial. How can the error of a trial judge vitiate the application of the double jeopardy clause thus penalyzing the defendant for the Court's error?

The Court below reasons that the result differs when a defendant moves for a new trial as opposed to when he merely appeals the trial court's failure to direct acquittal. Id. at 55. In the former instance he can be retried. In the latter, he cannot. This is an illogical distinction as well, since in both instances the trial judge erred in not acquitting. The logical remedy is acquittal not retrial. Admittedly, the law heretofore

enunciated by the Supreme Court has contributed to the uncertainty in applying the double jeopardy clause. See, e.g., United States v. Bass, 490 F.2d 846 (5th Cir. 1974).

The Supreme Court first encountered the question of the permissibility of remanding for a new trial after a reversal for insufficient evidence in Bryan v. United States, 338 U.S. 552 (1950). After extensive discussion of the statutory power of the Courts of Appeals the defendant's contention that a retrial would violate the double jeopardy clause was viewed thusly:

> He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal. . . [W]here the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. Francis v. Resweber, 329 U.S. 459, 462 (1947). See Trono v. United States, 199 U.S. 521, 533-534.

338 U.S. 552, 560.

The Court, however, did not seem to perceive the new issue of double jeopardy. The quote from Francis v. Resweber, 329 U.S. 459, 462 (1947) was dictum, and that case relied on United States v. Ball, 163 U.S. 662 (1895) which was concerned with a defective indictment not insufficient evidence. Not until Sapir v. United States, 348 U.S. 373 (1955) was the issue of reversal for insufficient evidence delineated from reversal for other error infecting a trial, and the Court has yet to face the issue presented by Appellant. The holding in Bryan v. United States, 338 U.S. 552 (1950), then, cannot be said to be controlling on the issues presented by Appellant, herein.

In Sapir v. United States, 348 U.S. 373 (1955), the Defendant had appealed from a conviction of conspiracy to defraud the United States. He had moved for a judgment of acquittal but the District Court denied the motion. On appeal, the Court of Appeals held that the motion should have been granted since the evidence was insufficient to convict, and it remanded with instructions to dismiss. 216 F.2d 722 (10th Cir. 1954). Upon the government's

motion for rehearing based on newly discovered evidence a new trial was granted. In a per curiam opinion the Supreme Court reinstated the first judgment. 348 U.S. 373. The Court did not directly face the double jeopardy issue saying merely that the first judgment directing acquittal was the correct one. Id.

Concurring in Sapir, Justice Douglas addressed the constitutional question. He argued that a new trial after an acquittal by an appellate court for insufficient evidence was no different from an acquittal by a trial court, and that a new trial was in either case proscribed by the double jeopardy clause of the Fifth Amendment. 348 U.S. at 374. He stated:

> If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. If, as in the Kepner case, the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence.

Id. It is noteworthy that Sapir had not alleged other errors and had made no motion for a new trial. Had those factors been present, however, it was not certain that the case would have been decided differently. Justice Douglas indicated that when a new trial is asked for then new considerations come into play, and the whole record is opened up for such disposition as is just. Id., citing Bryan v. United States, 338 U.S. 552 (1950). And see Trono v. United States, 199 U.S. 521 (1905); Stroud v. United States, 251 U.S. 15, 18 (1919); Francis v. Resweber, 329 U.S. 459, 462 (1947). A reversal on grounds of error that infected the trial would also be different. Id. citing Palko v. Connecticut, 302 U.S. 319 (1937). An acquittal on the basis of lack of evidence, however, concludes the controversy. Id.

Except for Justice Douglas' assertion that an acquittal for lack of evidence concludes the controversy, none of his other pronouncements concerning the effect of reversal for error or the effect when there is a motion for a new trial were

material to the case. It was not ascertainable whether his rationale was wholly that of the majority.

In Forman v. United States, 361 U.S. 427 (1960), it is revealed that Justice Douglas' opinion in Sapir was a fair statement of the law. In that case, the Defendant had appealed his conviction seeking a new trial. The Court of Appeals first reversed his conviction and remanded for an acquittal due to an erroneous instruction by the trial court on the statute of limitations. The Defendant's request for a new trial, however, had not been on grounds of insufficient evidence. On rehearing, the Court of Appeals remanded for a new trial. The Supreme Court held that a new trial would not violate the double jeopardy clause.

Again, however, as in Sapir, the issue of double jeopardy presented in the case sub judice was absent. In fact, no issue of double jeopardy underlay the Court's holding in Forman. There was ample evidence to convict. Id. at 426.

In comparison, the Court reinforced the opinion of Justice Douglas, rendered in Sapir, that an acquittal by an appellate court was entitled to the same weight as an acquittal by a trial court, at least where there was no request for a new trial. Even so, the Court seem to express that if a new trial was requested, then the whole record is opened up for whatever relief is just, even if it is beyond the relief sought. Id. at 425.

Again, Petitioner emphasizes that, in Sapir, no request for a new trial was made nor error alleged except that of failure to acquit. In Forman, the evidence was sufficient and the case turned instead on trial error. Therefore, the Supreme Court has not faced the issue of whether retrial upon a decision that the evidence is insufficient when the Defendant has requested a new trial because of errors at trial violates the double jeopardy clause. It's pronouncements on that point have been rendered as dicta.

The key determinant of whether the double jeopardy clause is implicated is whether a defendant will be subjected to multiple

trials for the same offense. United States v. Wilson, 420 U.S. 332 (1975). Green v. United States, 355 U.S. 184 (1957). In the case at bar, Petitioner has been subjected to multiple trials and this is inconsistent with the requirements of Wilson. See, also, United States v. Jenkins, 420 U.S. 358 (1975).

In fact, the opinion of the Court below leads to a situation in which repeated retrial for the same offense can go on endlessly as long as the defendant moves for a new trial on error other than failure to acquit. And even if there is no other error than that the evidence is insufficient, the state may retry such a defendant. This is clearly inconsistent with double jeopardy principles.

The justification for retrial is lacking when reversal is for lack of evidence. The appellate court in such cases is specifically holding that the prosecution has failed to meet the burden of proof and that a defendant was entitled to acquittal at trial. It is clear that situations which afford the prosecution a second chance to strengthen its case but, yet, deny the defendant the finality of his entitlement to an acquittal are violative of the double jeopardy clause. See, United States v. Dinitz, ____U.S. ____, 96 S.Ct. 1075 (1976); United States v. Wilson, 20 U.S. 355, 353 (1975).

Therefore, Petitioner urges, that the Court of Appeals erred in finding that Petitioner's request for a new trial permitted his retrial since any reading of Bryan, Sapir, and Forman suggests that the logical consequence of this application is that an appellate finding that there was insufficient evidence to convict should be no different from a directed verdict of acquittal at trial: in either case the double jeopardy clause bars retrial of a defendant for the same offense.

2. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEALS AND HAS LED TO CONFLICTING APPLICATION OF FEDERAL DOUBLE JEOPARDY PRINCIPLES IN THE STATE COURTS.

The United States Courts of Appeals unanimously agree that the federal appellate courts have discretion to either grant a new trial or direct an acquittal when a trial court errs in not directing acquittal. However, the Circuit Courts have conflicting approaches as to when retrial is within their discretion. (It has been discussed above that retrial in such cases is never justified under the decisions of the Supreme Court.)

The Fifth Circuit and the Eighth Circuit agree that retrial is proper whenever a defendant has moved for retrial. E.g., United States v. Koonce, 485 F.2d 374 (8th Cir. 1973); United States v. Musquiz, 445 F.2d 963 (5th Cir. 1971). The Fourth and Ninth Circuits have suggested, without deciding, that such a motion may be a prerequisite to retrial. See, United States v. Snider, 502 F.2d 645, 656n.24 (4th Cir. 1974); Buatte v. United States, 331 F.2d 848 (9th Cir. 1964).

The District of Columbia Circuit has questioned the validity of the Eighth Circuit's approach in Koonce, indicating that whether the defendant has moved for a new trial should not be a factor in the court's decision to retry. United States v. Wiley, 517 F.2d 1212, 1217 (D.C. Cir. 1975). In that case the Circuit Court ordered acquittal despite the fact that defendant had moved for a new trial. The Court's decision, however, was based upon its power under 28 U.S.C. §2106 rather than on double jeopardy principles.

Several Circuits have held that the decision to order trial is determined by the ability of the government to supplement its inadequate case if allowed to retry the defendant. E.g., United States v. Koonce, 485 F.2d 374 (8th Cir. 1973). (Mere possibility of obtaining sufficient evidence justifies retrial.); Beltran v. United States, 302 F.2d 48 (1st Cir. 1962); United States v. Snider, 502 F.2d 645 (4th Cir. 1974) (Indictment dismissed because insufficiency could not be cured on retrial).

Some cases have held that it would be "unjust" to give the prosecution a second chance to succeed after failing to make

a sufficient case at the first trial. E.g., United States v. Dotson, 440 F.2d 1225 (10th Cir. 1971). The Second Circuit, however, appears to have taken a unique approach: acquittal is appropriate if the prosecution has presented absolutely no competent evidence to establish a prima facie case, but if some evidence has been presented retrial is proper regardless of the prosecution's ability to supplement its case. E.g., United States v. Steinberg, 525 F.2d 1126, 1134-1135 (2d Cir. 1975).

A growing number of state courts have held that retrial after an appellate finding of insufficient evidence is barred by the Fifth Amendment double jeopardy clause. E.g., State v. Torres, 510 P.2d 737, 739 (Ariz. 1973); Hervey v. People, 495 P.2d 204, 208 (Colo. 1972); People v. Brown, 241 N.E. 2d 653, 659-664 (1st Dist. App. Ill. 1968); Commonwealth v. Dale, 335 A.2d 314 (Pa. Super. 1974) These decisions bring to their logical application the opinions in Forman v. United States, 361 U.S. 416 (1960) and Sapir v. United States, 348 U.S. 373 (1955).

Therefore, the decision of the Court of Appeals below is in conflict with the decisions in the several federal circuits and a growing number of states. It is a matter of great public interest that the conflict be resolved so that criminal defendants in like circumstances, whether in the federal or the state courts, can rely on the uniform application of Fifth Amendment double jeopardy principles to their situations.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

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APPENDIX A is a photocopy of the Opinion at 546 F 2nd 51 and has not been microfilmed.

APPENDIX B is a photocopy of the Opinion at 215 SO. 2nd 736 and has not been microfilmed.

APPENDIX C is a photocopy of the Opinion at 244 SO. 2nd 690 and has not been microfilmed.

APPENDIX D is a photocopy of the Opinion at 302 SO. 2nd 202 and has not been microfilmed.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

RICHARD AUSTIN GREENE,

Petitioner,

vs

No. 75-140-ORL-CIV-Y

RAYMOND D. MASSEY,
Superintendent, Union
Correctional Institution,

Respondent.

FILED
ORLANDO, FLA.
FEB 24 1976
WESLEY R. THIES
CLERK

ORDER

This cause came before the Court on a petition for writ of habeas corpus pursuant to 28 U.S.C.§2254. Petitioner was initially convicted of first degree murder on November 25, 1965, along with co-defendant Jose Manuel Sosa. The death sentence was imposed upon both defendants. On November 5, 1968, the Florida Supreme Court reversed that conviction in a per curiam decision which recited:

> "After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial. Sosa v. State 215 So. 2d 736, 737."

Petitioner moved successfully to transfer the retrial to the Circuit Court of Orange County, Florida. He then sought a writ of prohibition in the Second District Court

of Appeal on the ground that a retrial for first degree murder would constitute double jeopardy. The Second District Court of Appeal affirmed the trial court and refused to issue the writ. Sosa v. Maxwell, 234 So. 2d 690 (2d DCA Fla. 1970).

Upon retrial, defendant was again convicted of first degree murder, but this time with a recommendation for mercy and a life sentence. An appeal to the Fourth District Court of Appeal in which petitioner again raised the ground of double jeopardy, was taken and the appellate court affirmed on the strength of the previous opinion of the Second District Court of Appeal in refusing to issue a writ of prohibition. Greene vs. State, 302 So. 2d 202 (4th DCA, Fla. 1974). A petition for certiorari to the United States Supreme Court reiterating the double jeopardy claim was subsequently denied by that Court.

This Court has previously found that petitioner has exhausted his state remedies (Order of December 30, 1975).

The contention of petitioner has never specifically been ruled upon by the United States Supreme Court. See Bryan v. U.S., 338 U.S. 552 (1950); Sapir v. U.S., 348 U.S. 373 (1955) (concurring opinion of Douglas, J.); Forman v. U.S., 361 U.S. 427 (1960). If this were a question of first impression in the Fifth Circuit, this Court might be inclined to grant the petition. Regardless of whether an appellate court or a trial jury makes the determination that the evidence is

insufficient to sustain a finding of guilt as to a particular charge, and regardless of whether a petitioner moves for a new trial on other grounds in addition to asserting the ground of insufficiency of evidence, it would seem that the double jeopardy clause would preclude giving the prosecution a second chance. See Green vs. U. S., 355 U.S. 184 (1957). However, as petitioner has conceded, this is not the law in the Fifth Circuit. See, U.S. vs. Bass, 490 F.2d 846 (5th Cir. 1974). Furthermore, the situation of petitioner is not as compelling as that in which the "hung" jury fails to convict but does not render a verdict of acquittal. In the "hung" jury situation, a line of cases stemming from the 1824 decision in United States vs. Perez, 22 U. S. (9 Wheat.) 579, has held retrial proper. Here petitioner has in fact been found guilty by a jury.

Since this Court is bound by the present law of the Fifth Circuit and the United States Supreme Court, the petition for writ of habeas corpus must be denied. Accordingly, it is

ORDERED that the petition for writ of habeas corpus be and is hereby dismissed with prejudice.

DONE AND ORDERED in Chambers at Orlando, Florida this 24th day of February, 1976.

George C. Young
Chief Judge

APPENDIX

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-6617

RICHARD AUSTIN GREENE,
Petitioner,

—v.—

RAYMOND D. MASSEY
Superintendent, Union Correctional Institution,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 23, 1977
CERTIORARI GRANTED JUNE 20, 1977

Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DOCKET ENTRIES: United States District Court for the Middle District of Florida

1. May 15, 1975: Petition for Writ of Habeas Corpus.
2. June 11, 1975: Order to Show Cause issued.
3. July 7, 1975: Response to Order to Show Cause.
4. July 21, 1975: Petitioner's Response to Respondent's Response to Order to Show Cause, (filed *pro se*).
5. October 7, 1975: Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus, (filed *pro se*).
6. November 3, 1975: Notice of Appearance of Attorney Chandler for Petitioner.
7. November 4, 1975: Order directing clerk to furnish to Attorney for Petitioner copy of Respondent's Response, Directing Petitioner to file his reply thereto showing cause why this cause should not be dismissed within 20 days.
8. November 24, 1975: Traverse in compliance with Court's Order of November 3, 1975.
9. November 26, 1975: Brief of Petitioner in Support of his Traverse.
10. December 30, 1975: Order setting hearing and allowing counsel to submit further memoranda.
11. January 16, 1976: Respondent's Memorandum of Law.
12. February 9, 1976: Petitioner's Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus.
13. February 19, 1976: Proceedings and Arguments on Petition for Writ of Habeas Corpus.
14. February 19, 1976: Court denies Petition for Writ of Habeas Corpus.

15. February 24, 1976: Order, dismissing with prejudice the Petition for Writ of Habeas Corpus.

16. March 4, 1976: Notice of Appeal filed by Petitioner.

17. March 5, 1976: Certificate of Probable Cause issued by the Court.

DOCKET ENTRIES: United States Court of Appeals for the Fifth Circuit

1. March 18, 1976: Appeal Docketed.

2. May 4, 1976: Brief for Appellant filed.

3. May 12, 1976: Brief for Appellee filed.

4. May 21, 1976: Reply Brief for Appellant filed.

5. August 23, 1976: Supplemental Brief for Appellee filed.

6. September 3, 1976: Supplemental Reply Brief for Appellant filed.

7. October 5, 1976: Oral Argument.

8. January 26, 1977: Opinion Rendered.

9. February 17, 1977: Mandate Issued to Clerk.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 75-140-ORL-CIV-Y

RICHARD AUSTIN GREENE, PETITIONER-APPELLANT

versus

RAYMOND D. MASSEY, Superintendent,
Union Correctional Institution, RESPONDENT-APPELLEE

ORDER

This cause came before the Court on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was initially convicted of first degree murder on November 25, 1965, along with co-defendant Jose Manuel Sosa. The death sentence was imposed upon both defendants. On November 5, 1968, the Florida Supreme Court reversed that conviction in a per curiam decision which recited:

> "After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial. Sosa v. State 215 So. 2d 736, 737."

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Upon retrial, defendant was again convicted of first degree murder, but this time with a recommendation for mercy and a life sentence. An appeal to the Fourth District Court of Appeal in which petitioner again raised the ground of double jeopardy, was taken and the appellate court affirmed on the strength of the previous opinion of the Second District Court of Appeal in refusing to issue a writ of prohibition. *Greene* vs. *State*, 302 So. 2d 202 (4th DCA, Fla. 1974). A petition for certiorari to the United States Supreme Court reiterating the double jeopardy claim was subsequently denied by that Court.

This Court has previously found that petitioner has exhausted his state remedies (Order of December 30, 1975).

The contention of petitioner has never specifically been ruled upon by the United States Supreme Court. *See Bryan* v. *U.S.*, 338 U.S. 552 (1950); *Sapir* v. *U.S.*, 348 U.S. 373 (1955) (concurring opinion of Douglas, J.); *Forman* v. *U.S.*, 361 U.S. 427 (1960). If this were a question of first impression in the Fifth Circuit, this Court might be inclined to grant the petition. Regardless of whether an appellate court or a trial jury makes the determination that the evidence is insufficient to sustain a finding of guilt as to a particular charge, and regardless of whether a petitioner moves for a new trial on other grounds in addition to asserting the ground of insufficiency of evidence, it would seem that the double jeopardy clause would preclude giving the prosecution a second chance. See *Green vs. U.S.*, 355 U.S. 184 (1957). However, as petitioner has conceded, this is not the law in the Fifth Circuit. See, *U.S. vs. Bass*, 490 F.2d 846 (5th Cir. 1974). Furthermore, the situation of petitioner is not as compelling as that in which the "hung" jury fails to convict but does not render a verdict of acquittal. In the "hung" jury situation, a line of cases stemming from the 1824 decision in *United States vs. Perez*, 22 U.S. (9 Wheat.) 579, has held retrial proper. Here petitioner has in fact been found guilty by a jury.

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/s/ George C. Young
Chief Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 76-1719

RICHARD AUSTIN GREENE, PETITIONER-APPELLANT

versus

RAYMOND D. MASSEY, Superintendent,
Union Correctional Institution, RESPONDENT-APPELLEE

Jan. 26, 1977

Appeal From The United States District Court
For The Middle District Of Florida

Before BROWN, Chief Judge, and TUTTLE and TJOFLAT, Circuit Judges.

JOHN R. BROWN, Chief Judge:

Richard Austin Greene (Petitioner) appeals from denial of a writ of habeas corpus. In the initial 1965 Florida state jury trial, Petitioner along with Joseph Manuel Sosa was found guilty of first degree murder. During that proceeding, counsel for Petitioner made, among other motions, a motion for acquittal and a motion for new trial. Both were denied and the death sentence was imposed on both Petitioner and Sosa. Subsequently, on November 5, 1968, the Florida Supreme Court reversed that conviction. In its per curiam decision, the Florida Supreme Court concluded that

> [A]fter a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial. *Sosa* v. *State*, Fla., 1968, 215 So.2d 736, 737.

Because of this Circuit's consistent policy from our decision in *United States* v. *Musquiz*, 5 Cir., 1971, 445 F.2d 963, forward, the denial of the writ of habeas corpus based on a double jeopardy claim is affirmed.

History Repeated—Or Almost So

On remand from the Florida Supreme Court's reversal, Petitioner obtained the transfer of his retrial to the Circuit Court of Orange County, Florida. However, Petitioner's request for a writ of prohibition based on the contention that his retrial for first degree murder would constitute double jeopardy was denied by the state trial court. The denial of this writ based on the double jeopardy claim was affirmed by the Second District Court of Appeal.[1]

Upon retrial, Petitioner was again convicted of first degree murder, but this time with a recommendation for mercy. Consequently, Prisoner is now serving a life sentence. In an appeal to the Fourth District Court of Appeal in which Petitioner again urged the double jeopardy issue, his second conviction was affirmed.[2] Ultimately, a petition for a writ of certiorari which reiterated the double jeopardy claim was denied by the Supreme Court of the United States.[3]

Perhaps weary yet undaunted and asserting that the Double Jeopardy Clause[4] bars retrial once a conviction is reversed because of insufficient evidence, Petitioner sought a writ of habeas corpus from the federal court. In its February 1976 order, the District Court intimated that absent prior precedent from this Court it might

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[1] *Sosa* v. *Maxwell*, 2 DCA Fla., 1970, 234 So.2d 690.

[2] The Fourth District Court of Appeal determined that the ruling on the Second District Court of Appeal on the double jeopardy claim precluded their making a redetermination because of res judicata. *Sosa and Greene* v. *State*, 4 DCA Fla., 1974, 302 So.2d 202.

[3] *Greene* v. *Florida*, 1975, 421 U.S. 932, 95 S.Ct. 1660, 44 L.Ed.2d 89.

[4] The Fifth Amendment states ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, ..."

have granted Petitioner's request. However, the District Court felt constrained by our decisions in a line of cases beginning with *United States* v. *Musquiz*, 5 Cir., 1971, 445 F.2d 963.[5]

Twice No, Two Maybe

[1, 2] Only one outcome determinative issue is before this Court.[6] After a full-fledged jury trial in a state court where both a motion for acquittal and for a new

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[5] The District Court's order stated in part

> . . . . If this were a question of first impression in the Fifth Circuit, this Court might be inclined to grant the petition. Regardless of whether an appellate court or a trial jury makes the determination that the evidence is insufficient to sustain a finding of guilt as to a particular charge, and regardless of whether a petitioner moves for a new trial on other grounds in addition to asserting the ground of insufficiency of evidence, it would seem that the double jeopardy clause would preclude giving the prosecution a second chance. See *Green* v. *U.S.*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 76 (1957). However, as petitioner has conceded, this is not the law in the Fifth Circuit. See *U.S.* v. *Bass*, 490 F.2d 846 (5th Cir. 1974). R. 105-06.

[6] Florida also contended in its supplemental brief and during oral argument that the *Stone* v. *Powell* principle governing habeas collateral relief enunciated in the Fourth Amendment exclusionary rule context extends to this case where Petitioner has had repeated consideration of his double jeopardy claim by state courts. In responding to how the dissenters in *Stone* v. *Powell* characterized the Court's opinion ". . . as laying the groundwork for a 'drastic withdrawal of federal habeas jurisdiction, if not for all grounds . . ., then at least [for many] . . .'", the Supreme Court denoted the limited impact of its opinion.

> "With all respect, the hyperbole of the dissenting opinion is misdirected. Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding. . . . In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court

trial are timely made, does the subsequent reversal of a conviction by a state appellate court because of insufficient evidence bar retrial of a person for the same offense a second time? [7] In other words, does the double jeopardy

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lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been *both such a showing and a Fourth Amendment violation.*" (Emphasis added). *Stone* v. *Powell*, 1976, —— U.S. ——, 96 S.Ct. 3037, 49 L.E.2d 1067, 1088 n.37.

In light of the limited scope of *Stone* v. *Powell*, it is not applicable to this appeal where the only question is a legal one—does double jeopardy apply to his case? Furthermore, it is a specifically proclaimed "personal constitutional right". See note 4 above.

[7] Petitioner's argument is basically that had the trial court properly ruled on his motion for acquittal directing the jury to return a verdict of acquittal because of insufficient evidence, the State would not have been able to put Petitioner into jeopardy for a second time for the same offense. Consequently, when an appellate court reverses a conviction because of the trial court's error in not directing a verdict of acquittal for insufficient evidence, the same result, it is urged, necessarily follows.

No question exists about the inability of State or any prosecuting body to appeal a trial level verdict of not guilty or an acquittal. See *United States* v. *Wilson*, 1975, 420 U.S. 332, 341 n. 9, 95 S.Ct. 1013, 43 L.Ed.2d 232; *North Carolina* v. *Pearce*, 1969, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656; *Green* v. *United States*, 1957, 335 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199. However, it is also clear that a person may in certain instances be retried. In the words of Mr. Justice Story in *United States* v. *Perez*, 1824, 9 Wheat, 579, 580, 6 L.Ed. 165, in an instance where a prosecution terminated in a mistrial.

> "We are of the opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put on his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

In its recent pronouncement in the double jeopardy area, the Supreme Court applied the *Perez* standard where a mistrial was declared because of a hung jury. *United States* v. *Sanford*, 1976, —— U.S. ——, 97 S.Ct. 20, 50 L.Ed.2d 17. Also, "[i]t is elementary in our law that a person can be tried a second time for an offense

principle encapsulated in the Fifth Amendment necessitate that Petitioner's second conviction for first degree murder be vacated?

Although on superficial examination of the Double Jeopardy Clause its meaning appears to be plain; judicial experience demonstrates the deceptively subtle meaning of twice. For purposes of this appeal, the entire history of double jeopardy need not be considered because of the *Bryan-Sapir-Forman* trilogy [8] which this Circuit utilized to formulate the *Musquiz* principle.[9]

The Supreme Court decisions comprising this trilogy entail discussion of reversal on appeal of a *federal* conviction because of insufficient evidence.[10] For purposes

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when his prior conviction for that same offense has been set aside by his appeal." *Forman* v. *United States*, 1960, 361 U.S. 416, 425, 80 S.Ct. 481, 486, 4 L.Ed.2d 412. Despite the "elementary" concept that one may be tried a second time for an offense, the application of that principle is not so easily accomplished. In similar fashion, the "necessarily follows" portion of Petitioner's argument is challengeable.

[8] *Forman* v. *United States*, 1960, 361 U.S. 416, 80 S.Ct. 481, 4 L.Ed.2d 412; *Sapir* v. *United States*, 1955, 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426; *Bryan* v. *United States*, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335.

[9] Even prior to this Court's decision in *Musquiz*, *supra*, the reversal for insufficient evidence practice of remanding for a new trial versus remanding with instructions to dismiss the indictment had been predicated on whether Prisoner had requested a new trial or not. See *United States* v. *Goodson*, 5 Cir. 1971, 439 F.2d 1056, 1059. Contra, *United States* v. *Johnson*, 5 Cir., 1970, 427 F.2d 957.

[10] As indicated, *Bryan*, *supra*, directly discusses whether a remand instructing a new trial is appropriate rather than a remand directing dismissal of the indictment or similar action. In *Sapir*, *supra*, the per curiam opinion by the Supreme Court is rather unenlightening. However, in his concurring opinion Mr. Justice Douglas indicates that Spair had only made a motion for acquittal. For that reason, reversal of a conviction by the Court of Appeals for insufficient evidence requires dismissal of the indictment. The concurring opinion continues "If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens the whole record for such disposition as might be just." *Sapir*, *supra* at 374, 75 S.Ct. at 423, 99 L.Ed. at 427. In *dicta* in *Forman*, both *Bryan* and *Sapir* are discussed. The Supreme Court

of this Petitioner's appeal from a *state* court conviction, it is important to recognize the framework of *Bryan-Sapir-Forman*. They arose in the context of the interplay between the Double Jeopardy Clause and the power of the Courts of Appeals under 28 U.S.C. § 2106 to affect a court's judgment, decree, or order brought appropriately before a Court of Appeals.[11] The ruling of the Supreme Court in *Bryan* is evident.

> A new trial was one of the remedies which petitioner sought. He properly gave the District Court an opportunity after verdict to correct its error in failing to sustain his motion for judgment of acquittal at the conclusion of all the evidence, which claimed error was assigned as a ground for a new trial. We agree that on this record the order for a new trial was a just and appropriate judgment which the Court of Appeals was authorized to enter by 28 U.S.C. § 2106.
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> Petitioner's contention that to require him to stand trial again would be to place him twice in jeopardy is not persuasive. He sought and obtained the reversal of his conviction, assigning a number of

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concluded "[m]oreover, Sapir made no motion for a new trial in the District Court, while here petitioner filed such a motion. That was a decisive factor in Sapir's case." *Forman, supra* at 426, 80 S.Ct. at 487, 4 L.Ed.2d at 419. It is important to remember that *Forman* was an instance where the Court of Appeals reversed because of an improper jury instruction—not on insufficiency of the evidence. The evidence in *Forman* was sufficient. *Id.* at 424-26, 80 S.Ct. at 486, 4 L.Ed.2d at 418-19. Thus, the Supreme Court's affirmance of the reversal with a remand for a new trial in *Forman* is not inconsistent with the "distinguishing" criterion set forth in *Bryan* and *Sapir*.

[11] 28 U.S.C. § 2106 states

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963.

> alleged errors on appeal, including denial of his motion for judgment of acquittal. ". . . where the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial." *Francis* v. *Resweber*, 329 U.S. 459, 462 [67 S.Ct. 374, 91 L.Ed. 422]. See *Trono* v. *United States*, 199 U.S. 521, 533-34 [26 S.Ct. 121, 50 L.Ed. 292], *Bryan*, *supra*, at 560, 70 S.Ct. at 321, 94 L.Ed. at 342.

Furthermore, as this Court recognized in *Musquiz*, *supra* at 966, "[t]he distinction between *Bryan*, on the one hand, and *Forman* and *Sapir* on the other, seems to turn, under the present state of the law at least, on whether the defendant made a motion for a new trial in the district court." This distinction remains viable.[12]

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[12] In following our *Musquiz* practice, we are aware of the Supreme Court's recent pronouncements in the double jeopardy arena. In these recent decisions, the Supreme Court has clarified the ability of Government to appeal a Judge's ruling on a legal issue in favor of a defendant after a guilty verdict. In one, *United States* v. *Morrison*, 1976, —— U.S. ——, 97 S.Ct. 24, 50 L.Ed.2d 1, the Supreme Court quoted from *United States* v. *Wilson*, 1975, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232,

> "We therefore conclude that when a judge rules in favor of the defendant after verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause. 420 U.S. at 352-353 [95 S.Ct. [1013], at 1026]." *Morrison*, *supra* at ——, 97 S. at 26.

The Court's rationale in *Morrison* and *United States* v. *Rose* highlights an underlying concern of the double jeopardy principle. The appeal by Government, if successful, would result only in the reinstatement of the guilty verdict. No further proceedings relating to guilt or innocence would be required. *United States* v. *Morrison*, 1976, —— U.S. ——, 97 S.Ct. 24, 50 L.Ed.2d 1, *United States* v. *Rose*, 1976, —— U.S. ——, 97 S.Ct. 26, 50 L.Ed.2d 5. On the same day *Morrison* and *Rose* were decided, the Supreme Court ruled that Government may appeal a District Court's dismissal of an indictment which occurs after a hung jury mistrial but before a retrial. The reasoning was that *United States* v. *Perez*, 1824, 9 Wheat, 579, 580, 6 L.Ed. 165, permits a retrial when a mistrial occurs and based on *Serfass* v. *United States*, 1975, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265, jeopardy had not attached because the retrial had not

As indicated, Petitioner through his counsel made both a motion for acquittal and a motion for a new trial while this case was before the state trial court. Since *Musquiz* the usual practice of this Circuit when reversing a conviction due to insufficient evidence has been to remand with directions for a new trial—*if* a motion for a new trial was made in the trial court. At Petitioner's first trial, one was made. Thus, the only remaining consideration is whether the Florida Supreme Court possessed the power to review judgments, decrees, or orders similar to the power possessed by this Court under 28 U.S.C. § 2106.[13]

[3, 4] That the Supreme Court of Florida has review power at least equal to that possessed by this Court under § 2106 is demonstrated by the recent decision of *Tibbs* v. *State of Florida, Fla.*, 1976, 337 So.2d 788 [1976]. In *Tibbs*, the Supreme Court of Florida cited as its authority to review convictions for which the death sentence has been imposed, Fla.App.R. 6.16(b) [14] which

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begun. *United States* v. *Sanford*, 1976, —— U.S. ——, 97 S.Ct. 20, 50 L.Ed.2d 17.

Despite the importance placed by these decisions on the idea that the Double Jeopardy Clause is directed at the prevention of multiple prosecutions which includes new trials, their differences must be recognized. They entail discussion of appeals by Government from adverse legal determinations by a court. In Petitioner's instance, Florida does not appeal his conviction. Also, the clarification offered by these recent cases does not consider the *Bryan-Sapir-Forman* motion for new trial distinction. As a result, the additional scrutiny by the Supreme Court of instances when the Double Jeopardy Clause precludes appeals by Government does not move the procedure begun with *Bryan* and adopted by our *Musquiz* decision from the shadows of uncertainty into the sunlight of clarity. But *cf. United States* v. *Wiley*, 1975, 170 U.S.App.D.C. 382, 517 F.2d 1212, 1215-18.

[13] Previous decisions have considered whether the Double Jeopardy Clause applies to the states and have determined that it does. See *United States* v. *Wilson*, 1975, 420 U.S. 332, 339, 95 S.Ct. 1013, 43 L.Ed.2d 232; *Benton* v. *Maryland*, 1969, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707.

[14] As enacted, Fla.App.R. 6.16(b) is a verbatim copy of F.S.A. § 924.32 which was repealed by Laws 1970, c. 70-339, § 180. This review provision grants the Florida Court the power to review the evidence "in the interest of justice" even if the convicted de-

speaks, as did the Supreme Court of Florida, in terms of the "interests of justice" without regard to the legal insufficiency of the evidence. In light of this power of review and this Court's practice when both a motion of acquittal and for a new trial have been made,[15] we affirm the District Court's denial of a writ of habeas corpus.[16]

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fendant does not make such a request. As the quotation of Fla.App. R. 6.16(b) below indicates, this is a mandated review for one sentenced to death.

> b. *Sufficiency of Evidence.* Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the *evidence to determine if the interests of justice require a new trial,* whether the insufficiency of the evidence is a ground of appeal or not. (Emphasis added).

[15] See, e.g., *United States* v. *Carter,* 5 Cir., 1975, 516 F.2d 431, 436; *In Re Joyce,* 5 Cir., 1975, 506 F.2d 373, 379; *United States* v. *Bass,* 5 Cir., 1974, 490 F.2d 846, 852; *United States* v. *Peterson,* 5 Cir., 1974, 488 F.2d 645, 651; *United States* v. *Blake,* 5 Cir., 1974, 488 F.2d 101, 107; *United States* v. *Apollo,* 5 Cir., 1973, 476 F.2d 156, 158 n. 1; *United States* v. *Robinson,* 5 Cir., 1972, 468 F.2d 189, 194; *United States* v. *Restano,* 5 Cir., 1971, 449 F.2d 485, 488; *United States* v. *Musquiz,* 5 Cir., 1971, 445 F.2d 963.

[16] It is important to recognize that the *Musquiz* rule is *not* a mandatory practice in all instances. The wording of § 2106 speaks in terms of ". . . such further proceedings to be had as may be *just* under the circumstances." (Emphasis added). Under this § 2106 standard, we have recognized that a new trial may not be warranted when the prosecution had an opportunity to fully develop its case and failed to do so or when the prosecution did fully develop its case. See *United States* v. *Peterson,* 5 Cir., 1974, 488 F.2d 645, n. 14.

In a line of pre-*Musquiz* opinions, some of which indicate apparent awareness of the distinction between making both a motion for acquittal and for a new trial, some which do not, and others which do not reveal whether both motions were made, see, e.g., *United States* v. *Arendale,* 5 Cir., 1971, 444 F.2d 1260, 1269-70; *Watkins* v. *United States,* 5 Cir., 1969, 409 F.2d 1382, 1386; *Montoya* v. *United States,* 5 Cir., 1968, 402 F.2d 847, 850; *Newsom* v. *United States,* 5 Cir., 1962, 311 F.2d 74; *Hamilton* v. *United States,* 5 Cir., 1962, 304 F.2d 542; *Ackerman* v. *United States,* 5 Cir., 1961, 293 F.2d 445, 448; *Riggs* v. *United States,* 5 Cir., 1960, 280 F.2d 949, 955; *Guevara* v. *United States,* 5 Cir., 1957, 242 F.2d 745, 747,

If the Double Jeopardy Clause does not preclude such action by this Court exercising its § 2106 powers, it likewise does not prevent similar action by a state court exercising analogous powers.[17]

AFFIRMED.

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this Court has reversed for insufficient evidence and remanded for a presentation by Government to the trial court that it possesses sufficient additional evidence to carry its burden. If so, a new trial was considered appropriate. If not, a verdict of acquittal or similar action would have been proper. Despite our prior, pre-*Musquiz* vacillation, *United States* v. *Bass*, 5 Cir., 1974, 490 F.2d 846, 852-53, demonstrates our present adherence to *Musquiz* and that the *Musquiz* rule is not inflexible. The malleability of this Court's reversal and remand order is governed by the "just" factor of 28 U.S.C. § 2106 in conjunction with the Double Jeopardy Clause.

Likewise, Fla.App.R. 6.16(b) and its predecessor F.S.A. § 924.32 require the Florida Court to ". . . determine if the interests of justice require a new trial . . . ." Also, F.S.A. § 924.36, repealed by Laws 1970, c. 70-339, § 180, provided that "[w]hen the judgment is reversed, the appellate court shall either order that the defendant be discharged from the cause, or, if it thinks proper, grant a new trial." At the time of its review of Petitioner's first conviction in 1968, the Florida Supreme Court possessed power at least as great as that held by this Court under 28 U.S.C. § 2106. As such, the Florida Supreme Court's reversal and remand order is constrained by the relevant Florida statutes in conjunction with the Double Jeopardy Clause. The degree of pliability of the order under the "interests of justice" or "thinks proper" factors is not directly in question in this case—the ordering of a new trial is within the boundaries set by these factors.

[17] As intimated above in note 16, this case is decided on the basis of the similarity between the Florida Supreme Court's review powers and its review of Petitioner's case to this Court's *Musquiz* procedure from the trial level context of both a motion for acquittal and for a new trial. Recognizing that, in a state case where there has been the equivalent of a motion for directed judgment of acquittal accompanied by a motion for new trial on that ground or others, the use of Fla.App.R. 6.16(b)'s "interests of justice" as the court "thinks proper" might amount to an impermissible state attempt to circumvent the Fifth Amendment's double jeopardy protections, we do not intimate nor do we consider whether or to what degree variances in Florida's "interests of justice" or "thinks proper" standards may require a different outcome in *another* case. It is sufficient for disposition of this case that *Petitioner's* Fifth Amendment protections have not been violated by the Florida Court's statutorily required review and its subsequent order of a new trial.

SUPREME COURT OF THE UNITED STATES

No. 76-6617

RICHARD AUSTIN GREENE, PETITIONER,

v.

RAYMOND D. MASSEY, Superintendent,
Union Correctional Institutional

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 20, 1977

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SUPREME COURT OF THE UNITED STATES

RICHARD AUSTIN GREENE,)

Petitioner,)

V) CASE NO. 76-6617

RAYMOND D. MASSEY,)
Superintendent, Union
Correctional Institution,)

Respondent.)

_____)

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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OTHER AUTHORITY

OPINIONS BELOW

The opinion of the Florida Supreme Court which reversed Petitioner's conviction was rendered on November 5, 1968. See Sosa and Greene v State, 215 So. 2d 736 (Fla. 1968). The opinion which denied a writ of prohibition was rendered on April 17, 1970. See Sosa and Greene v Maxwell, 234 So. 2d 690 (2DCA Fla. 1970). The opinion which again considered Petitioner's second conviction after his retrial was rendered on October 25, 1974. See Greene and Sosa v State, 302 So. 2d 202 (4DCA Fla. 1974). The unreported opinion of a denial of habeas corpus relief was rendered on February 24, 1976. The opinion of the Fifth Circuit Court of Appeals affirming a denial of habeas relief was rendered on January 26, 1977. See Greene v Massey, 546 F. 2d 51 (5th Cir. 1977).

JURISDICTION

Petitioner in his jurisdictional statement seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. Section 1254 (1). In Petitioner's case, the opinion of the Fifth Circuit Court of Appeals, Greene v Massey, 546 F 2d 51 (5th Cir. 1977), was rendered on January 26, 1977. No Petition for Rehearing appears to have been filed by either party. Petitioner's Petition for Writ of Certiorari was filed in this Court on or about April 22, 1977. Said Petition is untimely and does not invoke this Court's jurisdiction. See 28 U.S.C., Section 2101 (c); Rule 22 (3), Rules of the Supreme Court. Petitioner has neither alleged nor requested an extension of time for the filing of his Petition. See Rule 22 (4), Rules of the Supreme Court; 28 U.S.C. Section 2101 (c). This Court is without jurisdiction to consider this Petition for Writ of Certiorari. See United States v Adams, 383 U.S. 39, 86 S. Ct. 708, 15 L Ed 2d 572 (1966); Carter v United States, ___U.S.___, 75 S.Ct. 911, 100 L Ed 1508 (1955). More than 30 days has elapsed from the date of the opinion by the Fifth Circuit Court of Appeal and the filing of this Petition. Rule 22; Carter, supra.

QUESTIONS PRESENTED

I

WHERE THE STATE HAS PROVIDED A DEFENDANT WITH AN OPPORTUNITY FOR FULL AND FAIR CONSIDERATION OF A FIFTH AMENDMENT CLAIM, IS FEDERAL HABEAS CORPUS PRECLUDED?

II

WHETHER THERE EXISTS REAL AND EMBARRASSING CONFLICT IN THE LOWER COURT'S DETERMINATION OR THE EXISTENCE OF ISSUES OF GREAT PUBLIC IMPORTANCE?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall "be subject for the same offense to be twice put in jeopardy of life or limb..."

AMENDMENT XIV

Section 1. * * * (N)or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 2254. State Custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Florida Appellate Rule 6.16 (b)

"Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

STATEMENT OF THE CASE

Petitioner and Sosa were tried and found guilty of murder in the first degree in November, 1965, and sentenced to death. An appeal was taken to the Florida Supreme Court in Sosa and Greene v State, 215 So. 2d 736 (Fla. 1968). On appeal, the Florida Supreme Court in a four to three decision reversed the judgments of conviction of the defendants and remanded the case for a new trial. In its opinion the Supreme Court stated:

> "PER CURIAM.
>
> After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.
>
> It is so ordered."
> Id., at 737.

After remanding the case for a new trial, Petitioner and Sosa filed a suggestion for a writ of prohibition against the trial court alleging that retrying the defendants again for murder in the first degree would be a violation of double jeopardy. The trial court denied the motion, and the defendants appealed the decision to the Second District Court of Appeal in Sosa and Greene v Maxwell, 234 So. 2d 690 (2DCA 1970). In Sosa and Greene, supra, the suggestion was denied

and the case was remanded for a new trial on the charge of murder in the first degree. Defendants appealed to the United States Supreme Court and certiorari was denied. Sosa and Greene v Maxwell, 402 U.S. 951, 91 S.Ct. 1617, 29 L Ed 2d 121 (1971).

Petitioner and Sosa were retired in January, 1972, convicted of murder in the first degree, and sentenced to life imprisonment. An appeal was taken to the Fourth District Court of Appeal in Greene and Sosa v State, 302 So. 2d 202 (4DCA Fla. 1974), which held that the doctrine of res judicata was dispositive of the case. An appeal was again taken to the United States Supreme Court, where certiorari was again denied. Green and Sosa v State of Florida, 421 U.S. 932, 95 S.Ct. 1660, 44 L Ed 2d 89 (1975).

Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court, Middle District, Orlando Division, on May 14, 1975, alleging that he was illegally restrained. A hearing was held on February 19, 1976 in United States District Court, where relief was denied. Petitioner appealed to the Fifth Circuit Court of Appeals in Greene v Massey, 546 F 2d 51 (5th Cir. 1977), where denial of relief was affirmed. The instant Petition followed.

ARGUMENTS AGAINST GRANTING CERTIORARI

I

WHERE THE STATE HAS PROVIDED A DEFENDANT WITH AN OPPORTUNITY FOR FULL AND FAIR CONSIDERATION OF A FIFTH AMENDMENT CLAIM, FEDERAL HABEAS CORPUS REVIEW SHOULD BE PRECLUDED.

Federal habeas corpus review is precluded where a State has provided a defendant with an opportunity for full and fair litigation of a Fourth Amendment claim. In the landmark case of Stone v Powell and Wolff v Rice, ___U.S.___, 96 S.Ct. 3037 (1976), this Court decided by a six to three majority that where the state has provided a defendant with an opportunity for full and fair litigation of a Fourth Amendment claim,a state prisonermay not be granted habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at his trial.

Implicit in its holding in Stone, is that a federal court must give finality to criminal convictions and that the states are competent forums for the adjudication of federal constitutional rights.

Petitioner in the case at bar received an opportunity for full and fair litigation of his Fifth Amendment claim in the state courts. In Sosa and Greene

v State, 215 So. 2d 736 (Fla. 1968), the Supreme Court in a four to three decision reversed the judgments of conviction and remanded the case for a new trial. Petitioner and his co-defendant filed a writ of prohibition in the trial court claiming that retrial of the defendants for first degree murder would constitute a violation of double jeopardy. The argument was rejected by the District Court of Appeal in Sosa and Greene v Maxwell, 234 So. 2d 690 (2DCA Fla. 1970):

> "The relators urge in this court that where an appellate court has reversed because of the insufficiency of the evidence it is tantamount of a finding of not guilty and to retry Sosa and Greene for murder in the first degree would constitute double jeopardy. We cannot agree with this conclusion under the facts of this case and we deny the writ of prohibition. The relators have not made a clear showing that the reversal by the Florida Supreme Court in this case was based on insufficiency of the evidence to establish an essential element or elements of the crimes charged. Rather, the reversal inthis case appears to be based on a finding that the evidence, though technically sufficient, is so tenuous as to prompt an appellate court to exercise its discretion and, in the interest of justice, grant a new trial." Id., at 691.

* * * * * * * * * *

> "Relators urge that the Fifth Amendment prohibition against double jeopardy is made applicable to the states through

> the Fourteenth Amendment as held in Benton v Maryland, 1969, 395 U.S. 784, 89 S.Ct. 2056, 23 L Ed 2d 707. We agree that the Federal standards used in applying the Fifth Amendment's bar against double jeopardy are applicable to the states...
>
> Moreover, the relators have cited and we have found, no cases interposing the prohibition against double jeopardy under the fact presented here. Indeed, some federal cases seem to allow a retrial after reversal even for fundamental insufficiency of evidence. Indeed, it would constitute an anomaly in law if an appellate court could not reverse and remand for a new trial if it was of the opinion that the evidence, while legally sufficient to support the jury's verdict was so far from convincing as to require a new trial in the interest of justice." Id., at 692.(Emphasis supplied).

From the opinion by the state appellate court in Sosa and Greene v Maxwell, supra, it is clear that by applying federal standards, the state court fully and fairly adjudicated Petitioner's double jeopardy claim and ruled adversely to Petitioner's position.

In a dissenting opinion, Mr. Justice Brennan acknowledged that this Court's majority opinion in Stone severely curtailed the role of federal habeas corpus review of state criminal convictions pursuant to 28 U.S.C. Section 2254:

> "I am therefore justified in apprehending that the groundwork is being laid today for a drastic withdrawal of federal habeas jurisdiction, if

> not for all grounds of alleged unconstitutional detention, then at least for claims--for example, of double jeopardy, entrapment, self-incrimination, Miranda violations, and use of invalid identification procedures--that this Court later decides are not 'guilty-related.'
>
> To the extent the Court is actually premising its holding on an interpretation of 28 U.S.C. §2243 or §2254, it is overruling the heretofore settled principle that federal habeas relief is available to redress any denial of asserted constitutional rights, whether or not denial of the right affected the truth or fairness of the fact finding process." Id.

Federal standards were applied to Petitioner in the case at bar. The state courts fully and fairly adjudicated Petitioner's double jeopardy claim. The Second District Court of Appeal considered Petitioner's claim and found it to be unmeritorious. The Fourth District Court of Appeal discussed the Fifth Amendment claim, but refused to consider the double jeopardy claim. See Greene v State, 302 So. 2d 202 (4DCA Fla. 1974). In all situations, the state courts were repeatedly presented with Petitioner's double jeopardy claim.

The Fifth Circuit Court of Appeals in Greene v Massey, 546 F 2d 51 (5th Cir. 1977), discussed the State's contention as to the applicability of Stone to Fifth Amendment claims and indicated:

> "Florida also contended in its supplemental brief and during oral argument that the Stone v Powell principle governing habeas collateral relief enunciated in

> the Fourth Amendment exclusionary rule context extends to this case where Petitioner has had repeated consideration of his double jeopardy claim by state courts.
>
> * * * * * * * * * *
>
> In light of the limited scope of Stone v Powell, it is not applicable to this appeal where the only question is a legal one--does double jeopardy apply to his case? Furthermore, it is a specifically proclaimed 'personal constitutional right.'" Id., at fn 6.

It should be noted that this Court has expressed an interest in recent decisions that federal habeas corpus review should be further restricted on claims other than alleged Fourth Amendment violations where the Stone principle is briefed and argued in the lower court and this Court. In Castaneda v Partida, ___U.S.___, 45 U.S.L.W. 4302 (March 23, 1977), this Court reached the merits of a grand jury claim of discrimination, however, in various dissenting opinions by Mr. Justice Burger, Mr. Justice Powell, Mr. Justice Rehnquist, and Mr. Justice Stewart, four Justices on this Court suggested that the Stone "opportunity for full and fair litigation" principle may be applicable to claims other than alleged Fourth Amendment violations. See Castaneda, supra, 45 U.S.L.W. at 4309, fn 1. Additionally, this Court in Swain v Pressley, ___U.S.___, 45 U.S.L.W. 4281 (March 22, 1977), held that a District of Columbia parallel post conviction remedy could be

substituted for federal habeas, and that a substitution of a new collateral remedy which is neither inadequate nor ineffective does not constitute a suspension of the writ.

In a concurring opinion by Mr. Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist, this Court further indicated:

> "Dicta to the contrary in Fay v Noia, 372 U.S. 391 (1963), have since been shown to be based on an incorrect view of the historic functions of habeas corpus. Schneckloth v Bustamonte, 412 U.S. 218, 252-256 (1973) (Powell, J., concurring). The fact is that in defining the scope of federal collateral remedies the Court has invariably engaged in statutory interpretation, construing what Congress has actually provided, rather than what it constitutionally must provide. See Developments in the Law--Federal Habeas Corpus. 83 Harv. L. Rev. 1038, 1268 (1970). Judge Friendly has expressed this view clearly:
>
> > 'It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did.' Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgment, 38 U.Chi.L.Rev. 142, 170 (1970) (footnote omitted).
>
> Since I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction. I see no issue of constitutional dimension raised by the statute in question." Id., at ___U.S.___, 45 U.S.L.W. at 4284.

Double jeopardy claims are not"guilty related". Petitioner was found guilty of murder in the first degree by two separate juries on two separate occasions. The opinion by the Second District Court of Appeal in Sosa and Greene v Maxwell, supra, 234 So. 2d at 692 indicates that the Florida Supreme Court's reversal was not based on insufficiency of the evidence; the same opinion further indicates that fundamental insufficiency of the evidence was not argued on direct appeal [1] by Petitioner, but was brought up sua sponte by the Florida Supreme Court through its power from Florida Appellate Rule 6.16 (b). See Sosa and Greene v Maxwell,supra, 234 So. 2d at 691, fn. 1.

In light of Stone and subsequent cases decided by this Court, it seems clear that this Court is prepared to consider extending Stone to claims other than alleged Fourth Amendment violations.

1/ Because fundamental insufficiency of the evidence was not brought up on direct appeal, Francis v Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L Ed 2d 149 (1976), and Estelle v Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L Ed 2d 126 (1976), may altogether preclude federal habeas review for failure to follow a state procedural rule. See also Wainwright v O'Berry, 546 F 2d 1204 (5th Cir. 1977).

II

PETITIONER HAS NOT ESTABLISHED THAT THIS COURT SHOULD ASSUME ITS DISCRETIONARY JURISDICTION OVER THE INSTANT CASE ON THE BASIS OF EITHER THE EXISTENCE OF A REAL AND EMBARRASSING CONFLICT OF AUTHORITIES INVOLVED IN THE LOWER COURT'S DETERMINATION OF THIS CAUSE OR THE EXISTENCE OF ISSUES OF GREAT PUBLIC IMPORTANCE BEYOND THAT OF THE IMMEDIATE LITIGANTS.

A

THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS IS IN ACCORD WITH PRIOR OPINIONS OF THIS COURT.

Pursuant to 28 U.S.C. Section 2106 an appellate court may reverse a judgment of conviction and remand the cause for a new trial. The section provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (Emphasis supplied).

The leading case construing the power of federal appellate courts to reverse a judgment of conviction pursuant to 28 U.S.C. Section 2106 is Bryan v United States, 338 U.S. 552, 70 S.Ct. 317, 94 L Ed 335 (1950). In Bryan, the defendant was convicted of two counts of attempt to evade the income

tax laws. The defendant moved for a judgment of acquittal at the end of the government's case and all the evidence. Both motions were denied. After [illegible]lty verdict the defendant again moved for a judgment of acquittal, or in the alternative for a new trial, which were denied. The Court of Appeals reversed the judgment of conviction and remanded the case for a new trial, because it found the evidence adduced at trial insufficient to sustain the conviction. An appeal was taken to the United States Supreme Court by the defendant claiming that a judgment of acquittal should have been entered at trial.

In rejecting the defendant's argument that requiring him to again stand trial would constitute a violation of the principles of double jeopardy, the Court held that when an accused successfully appeals his conviction the fifth amendment does not bar retrial. In addition, this Court announced that once a defendant appealed a conviction an appellate court became vested with broad discretion pursuant to 28 U.S.C. Section 2106 in determining what was an appropriate judgment under the circumstances.

By a comparable state statute, the Florida Supreme Court has review power at least equal to that possessed by this Court under 28 U.S.C. Section 2106. Florida Appellate Rule 6.16 (b) grants the Florida Supreme Court power to review the sufficiency of the evidence to determine if it is insufficient to support the judgment and if the "interests

of justice" require a new trial. In Tibbs v State of Florida, 337 So. 2d 788 (Fla.1976), the Florida Supreme Court cited as its authority to review convictions for which the death penalty has been imposed, Florida Appellate Rule 6.16 (b).

It is important to recognize that the power granted to the Florida Supreme Court by Florida Appellate Rule 6.16 (b), and federal appellate courts by 28 U.S.C. Section 2106, is not a mandatory practice. The statutes speak in terms of "such further proceedings ...as may be just under the circumstances," 28 U.S.C. Section 2106, and "the appellate court shall review the evidence to determine if the interests of justice require a new trial..." Florida Appellate Rule 6.16 (b).

The most important of the exceptions barring retrial is where a defendant waives the constitutional guarantee against double jeopardy by appealing a conviction.

In City of Charlotte v Firefighters, ___U.S.___, 49 L Ed 2d 732 (1976), this Court considered whether a two-tier court system violated the double jeopardy clause and indicated that the constitutional guarantee against double jeopardy imposes no limitations upon the power to retry a defendant who has succeeded in getting his first conviction set aside:

> "The decision to secure a new trial rests with the accused alone. A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a

> new trial. Under these circumstances, it long has been clear that the State may reprosecute. United States v Ball, 163 US 662, 41 L Ed 200, 16 S Ct 1192 (1896). The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a 'reversal' and a new trial without assignment of error in the proceedings at his first trial. Nothing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal." Id., at 49 L Ed 2d at 742.

In an analogous situation, where a defendant requests a mistrial due to the prosecution's error, in United States v Dinitz, ___U.S.___, 96 S.Ct. 1075, 47 L Ed 2d 267 (1976), defendant's main counsel was repeatedly cautioned by the trial judge about his opening argument. Persisting in his conduct, he was banished from the courtroom. The trial judge then requested his co-counsel, who was unprepared to go to trial, to proceed. The next day, co-counsel informed the court that the defendant wanted his main counsel to try the case. The trial judge set three alternatives that might be followed--a stay of the proceedings pending application to the court of appeals, continuation of the trial with defendant's co-counsel trying the case, or declaration of a mistrial. Co-counsel shortly moved for a mistrial.

The Supreme Court of the United States indicated that while the defendant was faced with a "Hobson's choice"

in moving for a mistrial, the defendant waived a defense of double jeopardy by moving for a mistrial:

> "...a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.... In such circumstances, the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration for purpose of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed in the event of such error." Id., ___U.S.___, 47 L Ed 2d at 274-275.

A defendant waive's a plea of double jeopardy by asking that his conviction be set aside. If a federal statute fails to run afoul of the double jeopardy clause, then a state rule, Florida Appellate Rule 6.16 (b), should be accorded similar consideration.

B

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF OTHER CIRCUIT COURTS OF APPEAL AND HAS NOT LED TO CONFLICTING APPLICATIONS OF THE PRINCIPLES OF DOUBLE JEOPARDY IN OTHER COURTS.

Two viewpoints have been enunciated by appellate courts in reference to whether a retrial violates the principles of double jeopardy. One line of cases from the Fifth Circuit Court of Appeals has repeatedly construed Bryan as permitting retrial for insufficiency of the evidence where the accused has waived the constitutional guarantee against double jeopardy by moving for a new trial. See United States v Carter, 516 F 2d 431 (5th Cir. 1975); United States v Peterson, 488 F 2d 645 (5th Cir. 1974); United States v Blake, 488 F 2d 101 (5th Cir. 1974); Apollo, 476 F 2d 156 (5th Cir. 1973); United States v Robinson, 4678 F 2d 189 (5th Cir. 1972); United States v Parks, 460 F 2d 736 (5th Cir. 1972); United States v Restano, 449 F 2d 485 (5th Cir. 1971); United States v Musquiz, 445 F 2d 963 (5th Cir. 1971).

In other circuits the decision to retry the defendant after a successful appeal depends upon whether the prosecution could supplement its case on retrial. But if the insufficiency of the evidence cannot be cured, on retrial, then an appellate court would be free to enter a judgment of acquittal or dismiss

the charge. See United States v Snider, 502 F 2d 645 (4th Cir. 1974); United States v Stapleton, 494 F 2d 1269 (9th Cir. 1974); United States v Koonce, 485 F 2d 374 (8th Cir. 1973); United States v Wiley, 478 F 2d 415 (8th Cir. 1973); United States v Howard,432 F 2d 1188 (9th Cir. 1970); United States v Fiore, 443 F 2d 112 (2nd Cir. 1971); United States v Edmons,432 F 2d 577 (2nd Cir. 1970); United States v Stroble, 431 F 2d 1273 (6th Cir. 1970); Phillips v United States,311 F 2d 204 (10th Cir. 1962).

In Forman v United States, 361 U.S. 416, 80 S.Ct. 481, 4 L Ed 2d 412(1960), this Court indicated:

> "Under 28 U.S.C. Section 2106, the Court of Appeals has full power to go beyond the particular relief sought...when (petitioner) opened up the case by appealing from his conviction, he subjected himself to the power of the appellate court to direct such 'appropriate' order as it thought just under the circumstances." Id., at 425-426.

While a growing number of courts have held that retrial after an appellate finding of insufficient evidence allows the appellate court to discharge a defendant, see United States v Wiley, 517 F 2d 1212 (D.C. Cir. 1975); State v Torres, 510 P 2d 737 (Ariz. 1973); Hervey v People, 495 P 2d 204 (Colo. 1972); People v Brown, 241 NE 2d 653 (Dist. App. Ill. 1968), the majority view as announced by this Court in Bryan, and the various federal appellate courts, allows an appellate court to remand the cause for a new trial.

The rule allowing retrial is not mandatory in all instances. Instead, an appellate court is granted the option of remanding for a new trial if the error may be cured, entering a judgment of conviction for a lesser included offense to meet the evidence, or discharging defendant. No violation of the principles of double jeopardy occurred upon a reversal for insufficient evidence. Nothing in the double jeopardy clause precludes a State from retrying a defendant who sucessfully obtains a reversal based upon insufficient evidence.

CONCLUSION

The Stone principle may be applicable to Fifth Amendment claims of double jeopardy where the issue was repeatedly considered by the state courts. When a defendant appeals a conviction, the double jeopardy clause does not bar retrial. This Court should not reach the merits of Petitioner's double jeopardy claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished, by mail, this 26th day of May, 1977, to Honorable John T. Chandler, Florida Legal Services, Inc., Prison Project, 2614 S.W. 34th Street, Gainesville, Florida 32608; and Honorable Donald C. Peters, Office of Clinics, Room 320, College of Law, University of Florida, Gainesville, Florida 32614, Attorneys for Petitioner.

Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6617

RICHARD AUSTIN GREENE,

Petitioner,

v.

RAYMOND D. MASSEY, Superintendent
Union Correctional Institution,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the order of the United States District Court for the Middle District of Florida is reported as *Greene v. Massey*, 546 F.2d 51 (5th Cir. 1977), and is contained in the appendix. The order of the District Court dismissing the petition for writ of habeas corpus is unreported but is contained in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1977. The petition for a writ of certiorari was filed on April 23, 1977, and granted on June 20, 1977. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Did the Court of Appeals err in finding that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution did not bar retrial of Defendant for first degree murder after the Florida Supreme Court found that the evidence was insufficient to prove the commission of that offense?

STATEMENT OF THE CASE

Petitioner, Richard Austin Greene, along with Joseph Manuel Sosa, was found guilty in a Florida state jury trial in 1965 of murder in the first degree. During that proceeding, counsel for Petitioner made a motion for a directed verdict of acquittal and a motion for new trial. Both were denied. Petitioner received the death penalty.

On November 5, 1968, the Florida Supreme Court reversed the conviction. In a per curiam decision, the Florida Supreme Court concluded that:

> [A]fter a careful review of the voluminous evidence here we are of the opinion that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So.2d 736, 737 (Fla. 1968).

On remand from the Florida Supreme Court's reversal, Petitioner obtained a transfer of venue for his retrial to the Circuit Court of Orange County, Florida. Petitioner's request for a writ of prohibition based on the contention that his retrial for first degree murder would constitute double jeopardy was denied by the State trial court and, upon appeal of the denial, the appellate court affirmed. *Sosa v. Maxwell*, 234 So.2d 690 (2d DCA Fla. 1970).

Upon retrial, Petitioner was again convicted of first degree murder, but with a recommendation for mercy. Petitioner was sentenced to life imprisonment which he has been serving continuously to date.

Petitioner appealed to the Fourth District Court of Appeal of Florida on the ground that his retrial for the same offense after the Florida Supreme Court had found the evidence at his first trial insufficient to establish his guilt beyond a reasonable doubt placed him in double jeopardy. The Fourth District Court of Appeal affirmed his conviction. *Sosa and Greene v. State*, 302 So.2d 202 (4th DCA Fla. 1974). A petition for a writ of certiorari reiterating the double jeopardy claim was denied by the United States Supreme Court. *Greene v. Florida*, 421 U.S. 932 (1975).

Thereafter, Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, urging that the Double Jeopardy Clause bars retrial once a conviction for the same offense is reversed because the trial court erred in not granting acquittal due to insufficient evidence. In its February 1976 order, the District Court intimated that absent prior precedent in the Fifth Circuit it might have granted Petitioner's request. However, constrained by precedent of Fifth Circuit opinions, the District Court denied the writ.

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §2253. The denial of the writ was affirmed because in addition to his motion for acquittal Petitioner had moved for a new trial. *Greene v. Massey*, 546 F.2d 51 (5th Cir. 1977). The Circuit Court further based its finding that retrial was proper in this case on its interpretation that the federal circuit courts have the power to reverse for retrial in such cases pursuant to 28 U.S.C. §2106 and the Florida Supreme Court has similar power of review.

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING THAT THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION DID NOT BAR RE-TRIAL OF DEFENDANT FOR FIRST DEGREE MURDER AFTER THE FLORIDA SUPREME COURT FOUND THAT THE EVIDENCE WAS INSUFFICIENT TO PROVE THE COMMISSION OF THAT OFFENSE.

Petitioner, Richard Austin Greene, in 1965, was convicted of first degree murder. On appeal, the Florida Supreme Court overturned that conviction upon its finding that the State had presented insufficient evidence to establish defendant's guilt beyond a reasonable doubt. *Sosa v. State,* 215 So.2d 736 (Fla. 1968). However, in its per curiam opinion, the court remanded for a new trial for the same offense, and it is this eventuality that gives rise to the double jeopardy claim. *Id.*

That Petitioner was entitled to an order of acquittal by the trial judge is stated in language that could not have plainer meaning:

> After a careful review of the voluminous evidence here we are of a view that the evidence was *definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder* in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Id. at 737 (Emphasis added).

When the Florida Supreme Court held the evidence to be insufficient to convict, as a matter of law, it established that the trial court erred in failing to acquit. If the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would have prevented a new trial for the same offense. There should be no difference when an appellate court, correcting the injustice by ruling as the trial judge should have ruled, reverses a conviction for lack of evidence.

Sapir v. United States, 348 U.S. 373, 374 (1955) (per curiam) (Douglas, J., concurring).

Having decided that the evidence is insufficient to convict, an appellate court cannot remand for a new trial under the rationale that justice is thereby served without violating the plain justice that logic and the Double Jeopardy Clause demand. Mere citation of a rule of procedure or statute will not justify retrial when the United States Constitution is thereby contravened. However, the court below reasoned that the decisions of the Supreme Court establish that the federal circuit courts have the power under 28 U.S.C. §2106 to remand for a new trial after finding that the evidence is insufficient to convict. *Greene v. Massey*, 546 F.2d 51, 55 (5th Cir. 1977) (Appendix). The Court further reasoned that under §924.32, Florida Statutes (1967), The Florida Supreme Court had similar power to remand Petitioner's case for retrial. *Id.* at 56 (Appendix).

A defendant who obtains from the trial judge the directed verdict of acquittal to which he is entitled because of insufficient evidence cannot be retried for the same offense. *Green v. United States*, 355 U.S. 184 (1957). It is incongruous and illogical that a defendant who obtains from an appellate court a reversal of his conviction due to insufficient evidence to convict can be retried. The reason for reversal is identical to the reason for the directed verdict: the prosecution failed to present sufficient evidence to prove the crime charged. What this amounts to is that when a trial court errs in not granting an acquittal the defendant can be subjected to retrial. How can the error of a trial judge vitiate the application of the Double Jeopardy Clause thus penalizing the defendant for the Court's error?

The Court below reasons that the result must differ when a defendant moves for a new trial as opposed to when he merely appeals the trial court's failure to direct acquittal. *Id.* at 55. In the former instance he can be retried. In the latter, he cannot. This is an illogical distinction as well, since in both instances the trial judge erred in not acquitting. The logical

remedy is acquittal, not retrial. Admittedly, the law heretofore enunciated by the Supreme Court has contributed to the uncertainty in applying the Double Jeopardy Clause *See, e.g., United States v. Bass*, 490 F.2d 846 (5th Cir. 1974).

The Supreme Court first encountered the question of the permissibility of remanding for a new trial after a reversal for insufficient evidence in *Bryan v. United States*, 338 U.S. 552 (1950). After extensive discussion of the statutory power of the Courts of Appeals the defendant's contention that a retrial would violate the Double Jeopardy Clause was viewed thusly:

> He sought and obtained the reversal of his conviction, assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal . . . [W]here the accused successfully seeks review of a conviction, there is no double jeopardy upon a new trial. *Francis v. Resweber*, 329 U.S. 459, 462 (1947). *See, Trono v. United States*, 199 U.S. 521, 533-534.
>
> 338 U.S. 552, 560.

The Court, however, did not seem to perceive the new issue of double jeopardy. The quote from *Francis v. Resweber*, 329 U.S. 459, 462 (1947) was dictum, and that case relied on *United States v. Ball*, 163 U.S. 662 (1895) which concerned a defective indictment not insufficient evidence. Not until *Sapir v. United States*, 348 U.S. 373 (1955) was the issue of reversal for insufficient evidence delineated from reversal for other error infecting a trial, and since that case the Court has yet to directly face the issue presented herein. The holding in *Bryan v. United States*, 338 U.S. 552 (1950), then, cannot be said to be controlling on the issues here presented for review.

In *Sapir v. United States*, 348 U.S. 373 (1955), the defendant had appealed from a conviction of conspiracy to defraud the United States. He had moved for a judgment of acquittal but the District Court denied the motion. On appeal the Court of Appeals held that the motion should have been granted since the evidence was insufficient to convict, and it remanded with instructions to dismiss. 216 F.2d 722 (10th Cir. 1954). Upon the government's motion for rehearing based

on newly discovered evidence a new trial was granted. In a per curiam opinion the Supreme Court reinstated the first judgment. 348 U.S. 373. The Court did not directly face the double jeopardy issue saying merely that the first judgment directing acquittal was the correct one. *Id.*

Concurring in *Sapir*, Mr. Justice Douglas addressed the constitutional question. He argued that a new trial after an acquittal by an appellate court for insufficient evidence was no different from an acquittal by a trial court, and that a new trial was in either case prohibited by the Double Jeopardy Clause of the Fifth Amendment. 348 U.S. at 374. He stated:

> If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. If, as in the Kepner case, the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellate court orders a judgment of acquittal for lack of evidence.

Id. It is noteworthy that Sapir had not alleged other errors and had made no motion for a new trial. Had those factors been present, however, it was not certain that the case would have been decided differently. Mr. Justice Douglas indicated without explanation that when a new trial is asked for then new considerations come into play, and the whole record is opened up for such disposition as is just. *Id.*, citing *Bryan v. United States*, 338 U.S. 552 (1950). And see *Trono v. United States*, 199 U.S. 521 (1905); *Stroud v. United States*, 251 U.S. 15, 18 (1919); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947). Reversal on grounds of error that infected the trial would also be different. *Id.* citing *Palko v. Connecticut*, 302 U.S. 319 (1937). An acquittal on the basis of lack of evidence, however, concludes the controversy. *Id.*

Except for Mr. Justice Douglas' assertion that an acquittal for lack of evidence concludes the controversy, none of his other pronouncements concerning the effect of reversal for error or the effect when there is a motion for a new trial were material to the case. It was not ascertainable whether his rationale was wholly that of the majority.

In *Forman v. United States*, 361 U.S. 427 (1960), it appears that Mr. Justice Douglas' opinion in Sapir was representative of the views of a majority of the Court. In that case the defendant had appealed his conviction seeking a new trial. The Court of Appeals first reversed his conviction and remanded for an acquittal due to an erroneous instruction by the trial court. The defendant's request for a new trial, however, had not been on grounds of insufficient evidence. On rehearing, the Court of Appeals remanded for a new trial. The Supreme Court held that a new trial would not violate the Double Jeopardy Clause.

Again, however, as in *Sapir*, the issue of double jeopardy presented in the case sub judice was absent. In fact, no issue of double jeopardy underlay the Court's holding in *Forman*. There was ample evidence to convict. *Id.* at 426.

In comparison, the Court reinforced the opinion of Mr. Justice Douglas, rendered in *Sapir*, that an acquittal by an appellate court was entitled to the same weight as an acquittal by a trial court, at least where there was no request for a new trial. Even so, the Court seemed to express that if a new trial was requested, then the whole record is opened up for whatever relief is just, even if it is beyond the relief sought. *Id.* at 425. The logic of such an analysis is not apparent.

Again, Petitioner emphasizes that in *Sapir* no request for a new trial was made nor error alleged except that of failure to acquit. In *Forman*, the evidence was sufficient and the case turned instead on trial error. Therefore, this Court has yet to face the issue of whether retrial is proper under double jeopardy principles when a defendant has moved for a new trial and upon appeal an appellate court finds that the evidence at trial was insufficient to convict. All pronouncements on that point have been rendered as dictum.

Petitioner acknowledges the myriad decisions of the federal courts of appeal which have reversed and remanded for a new trial after a finding of insufficient evidence to convict. E.g., *United States v. Burks*, 547 F.2d 968 (6th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3806 (U.S. June 13, 1977) (No.

76-6528), *United States v. Bass*, 490 F.2d 846 (5th Cir. 1974), *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973), *Melton v. United States*, 398 F.2d 321 (10th Cir. 1968). Nevertheless, federal courts have recognized that retrial can be fundamentally unfair and acquittal has either been ordered or else the trial court was directed to consider the question of fairness. E.g. *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), *United States v. Ramirez*, 428 F.2d 807 (2d Cir. 1973), *Watkins v. United States*, 409 F.2d 1382 (5th Cir. 1969). Although *Forman v. United States*, 348 U.S. 373 (1955) was not a case in which reversal was based upon insufficient evidence, still it is often cited for the proposition that if a defendant asks for a new trial then it is not unjust to grant a new trial even if a verdict of acquittal should have been granted at trial. E.g., *United States v. Koonce*, 485 F.2d 374 (8th Cir. 1973). This is fundamentally unfair, is a violation of the double jeopardy clause and it asserts an illogical proposition. A scholarly discussion of these points can also be found by examining *United States v. Wiley*, 517 F.2d 1212 (D.C. Cir. 1975).

In *Wiley*, the Court of Appeals for the District of Columbia noted that neither the idea that courts should utilize a balancing test between fairness to the defendant and to the government, nor the idea that a defendant, by asking for a new trial, waives the issue of double jeopardy, provides a sound basis for subjecting to retrial one who is wrongfully denied a judgment of acquittal at trial. *Id.* at 1215-1217. The Court also noted the confusion caused by the Supreme Court's decisions in *Bryan, Sapir* and *Forman. Id.* at 1216 n.22. Regardless of the inconclusive nature of the law as a result of *Bryan, Sapir* and *Forman* and in spite of the arguments that it acknowledged to be persuasive as to what the law justly should be, the court chose not to decide the case on the issue of double jeopardy but presumed that double jeopardy was not present. *Id.* at 1217-1218. Rather, the court chose to exercise its power to dispose of appeals in the interest of justice under 28 U.S.C. §2106 and found that retrial would not be just. *Id.* at 1218-1223.

Among the many state courts which have been confronted with the issue at bar there has been a growing recognition that retrial after an appellate finding of insufficient evidence constitutes double jeopardy. *State v. Torres*, 510 P.2d 737 (Ariz. 1973); *Hervey v. People*, 495 P.2d 204 (Colo. 1972); *People v. Brown*, 241 N.E.2d 653 (1st Dist. Ct. App. Ill. 1968). (A compelling discussion of the reasoning asserted by Petitioner, herein.); *State v. Alston*, 216 S.E.2d 416 (Ct. App. N.C. 1975). (An incisive discussion of the differences between reversal for error and the need for differing treatment under double jeopardy principles, including well-reasoned commentary on the controlling United States Supreme Court cases.); *State v. Moreno*, 364 P.2d 594, 595 (N.M. 1961).

These state court decisions confront the conflict posed by the comparison of the opinions in *Bryan v. United States*, 338 U.S. 552 (1950); *Sapir v. United States*, 348 U.S. 373 (1955), and *Forman v. United States*, 361 U.S. 416 (1960). "Since the defendant's motion for judgment of acquittal . . . should have been granted, a new trial . . . would be contrary to the Fifth Amendment guarantee against double jeopardy." *Hervey v. People*, 495 P.2d 204, 208 (Colo. 1972), citing 348 U.S. 373.

> If [a defendant's] double jeopardy rights are deemed to have been waived by his request for a new trial, the waiver should take effect only if the reversal is granted for the reasons contained in the new trial request, and if the conviction is reversed for lack of evidence, the waiver contained in an accompanying request for new trial would never become operative.

People v. Brown, 241 N.W.2d 653, 661 (1st Dist. Ct. App. Ill. 1968). (In resolution of the apparent conflict among *Bryan, Sapir* and *Forman.*) *Accord. State v. Alston*, 216 S.E.2d 416, 418 (Ct. App. N.C. 1975). These State court decisions have recognized the fundamental difference between reversals for error when the lower court fails to grant an acquittal because of insufficient evidence and reversals for other trial error, and that justice requires the application of different appellate remedies in each case.

Reversals because of insufficient evidence and reversals for other trial error should be treated differently. Their difference suggests that a separate remedy is required, not only under constitutional standards but in the interest of logical continuity which must support any perception of justice in our system of laws. Failing to utilize logical consistency forces our courts to rely on cliches, catchwords, and legal fictions to avoid direct confrontation with what logic indicates should be the correct rule of law. Similarly, a court may be constrained in following the logical path to justice in its fear of releasing a possibly dangerous person. Petitioner posits that this fear is demonstrably ill-founded.

The distinguishing factor between the two categories of error under consideration is the relationship between the kind of error and the burden of proof needed to convict in any criminal trial. Guilt of a criminal charge must be established by proof beyond a reasonable doubt, and this is a requirement of due process applicable to the states. *In re Winship*, 397 U.S. 358 (1970). Many may fear that releasing a defendant after a finding of reversible error would be a failure to protect society from crime since the error may bear little relationship to whether the prosecution has made out a *prima facie* case. This is true since the jury's determination that the defendant is guilty probably means that the prosecution has met the burden of proof despite the error. To release such a defendant would impair the function of the criminal law. In these cases the defendant is not entitled to acquittal at trial. He is entitled to one fair trial, and if error mars his trial retrial seems appropriate since the evidence was sufficient to go to the jury.

However, when a judge sees that his duty is to reverse for insufficient evidence he should not object to an acquittal, especially since his finding indicates that he would have voted for acquittal himself. To release such a defendant is not the release of a dangerous person. The man is not guilty of the crime charged. Society, through the courts, should not fear releasing such a defendant any more than it fears a jury acquittal.

No undue burden is imposed on society by releasing those defendants whose convictions have been reversed for lack of evidence. The oppression, harrassment, and possibility of convicting even the innocent who are subjected to multiple trials, all of which the double jeopardy clause was meant to prevent, is clearly present in a new trial following a reversal for insufficient evidence. *See, Green v. United States,* 355 U.S. 184, 187-188 (1957). In the insufficient evidence case remanded for retrial, the appellate court is in essence saying, "Well, the prosecution failed to prove you guilty this time but they can have another chance." This, Petitioner urges, violates his right not to be put twice in jeopardy for the same offense.

Can it be logically said that the grant of a retrial for insufficiency of the evidence can be justified "in the interest of justice"? The answer is a clear "No!". In such cases the prosecution failed in its duty to sustain its burden of presenting proof sufficient to convict. The judge committed error in not directing acquittal and the defendant failed to have the verdict he was entitled to at trial as a matter of law. A new trial, while ostensibly granted in the interest of justice, merely exacerbates the injustice done by the failings of the prosecutor and trial judge. It makes a mockery of the concept of fundamental fairness and the idea of due process to grant a new trial in such cases by citing that it is in the interest of justice. Justice has already failed the defendant at trial and it fails him again when he faces the jeopardy of a new trial to correct errors of judicial officers.

Cases permitting a new trial after reversal for error have reasoned that the defendant waives his double jeopardy protection by appealing. E.g., *United States v. Ball,* 163 U.S. 662 (1896), *Bryan v. United States,* 338 U.S. 552 (1950); but see, *Green v. United States,* 355 U.S. 184 (1957). "A defendant's attempt to obtain from an appellate court the acquittal which should have been entered by the trial judge cannot fairly or logically be deemed a relinquishment of double jeopardy protection or a consent to retrial." *United States v. Wiley,* 517 F.2d 1212, 1216 (1975). A request for a

trial free from prejudicial error, as distinguished from lack of evidence, however, can be reasonably argued as consistent with double jeopardy principles. *Id.* at 1216. In any case, the relief commensurate with a finding of insufficient evidence is, logically, acquittal not retrial. *Id.* at 1216.

Further, the Supreme Court has stated:

> "Waiver" is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of *voluntary knowing relinquishment of a right.*

Green v. United States, 355 U.S. 184, 191 (1957) (emphasis added). In that case, the defendant had been charged with first degree murder, but was convicted of second degree murder. He appealed. On remand he was again tried for first degree murder, against his protest that this was double jeopardy, and he was convicted for that offense. On appeal, the conviction was affirmed. Green petitioned the Supreme Court for a writ of certiorari on the ground that he had been twice in jeopardy for the same offense.

The government argued that Green waived his claim of double jeopardy by appealing. The government's position left Green the choice of appealing and being subjected to retrial of an offense for which he had been impliedly acquitted, or he could accept the conviction of second degree murder. This, the Supreme Court held, was not a meaningful choice. The Court recited:

> Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.

Id., citing Kepner v. United States, 194 U.S. 100 at 135 (1904).

Under any theory which subjects a person to retrial after reversal for lack of evidence, whenever a defendant asks for a new trial based upon other error he is effectively forced to

surrender one right to obtain another. *Compare Bryan v. United States,* 338 U.S. 552 (1950), with *Sapir v. United States,* 348 U.S. 373 (1955), and *Forman v. United States,* 361 U.S. 427 (1960). If a defendant merely alleges that the trial court erred in not directing an acquittal based upon insufficient evidence, and nothing more then the appellate court may not grant a new trial. *Sapir v. United States,* 348 U.S. 373 (1955); *Forman v. United States,* 361 U.S. 427 (1960). To protect his claim under the Double Jeopardy Clause the defendant would be forced to give up his claim of error on grounds other than lack of evidence. He has no assurance that the appellate court will agree that the evidence is insufficient. To condition the assertion of his right to acquittal on giving up his right to claim other error cannot be justified under the Constitution.

It now appears that the controlling factor in double jeopardy cases not involving mistrial is whether the appellate determination would subject the appellant to "a second trial before a second trier of fact". *United States v. Wilson,* 420 U.S. 332 (1975). The Court stated, ". . . [W]here there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." 420 U.S. at 344. It would appear that the same reasoning should apply when, on appeal, it is found that there is insufficient evidence: successive prosecutions offend the Double Jeopardy Clause.

In *Wilson,* a jury verdict of guilty was rendered. The trial judge, however, directed a verdict of acquittal. The government appealed and the Court of Appeals reversed, reinstating the guilty verdict. The Double Jeopardy Clause was not offended since the Defendant would not be subject to multiple punishment or successive trials. *Id.*

Clearly, a defendant who is found guilty at trial based upon sufficient evidence has been in jeopardy. If trial error infected his trial he is entitled to seek a new trial. But, at no stage of the proceedings has there been a finding of acquittal, or entitlement thereto, so that double jeopardy principles would

be involved upon retrial. However, once the trial judge or the appellate courts determine that the defendant was entitled to acquittal it is illogical and unjust to retry him, especially in light of double jeopardy principles which unquestionably attach upon trial acquittal.

The key determinant, then, of whether the double jeopardy clause is implicated is whether a defendant will be subjected to multiple trials for the same offense. *United States v. Wilson*, 420 U.S. 332 (1975). *Green v. United States*, 335 U.S. 184 (1957). In the case at bar, Petitioner has been subjected to multiple trials and this is inconsistent with the requirements of *Wilson*. *See, also, United States v. Jenkins*, 420 U.S. 358 (1975).

In fact, the opinion of the Court below leads to a situation in which retrial for the same offense can go on endlessly as long as the defendant moves for a new trial on error other than failure to acquit. And according to the Court below even if there is no other error than that the evidence is insufficient, the state may retry such a defendant. This is clearly inconsistent with double jeopardy principles.

The justification for retrial is lacking when reversal is for lack of evidence. The appellate court in such cases is specifically holding that the prosecution has failed to meet the burden of proof and that the defendant was entitled to acquittal at trial. It is clear that situations which afford the prosecution a second chance to strengthen its case but, yet, deny the defendant the finality of his entitlement to an acquittal are violative of the double jeopardy clause. *See, United States v. Dinitz*, 424 U.S. 600 (1976); *United States v. Wilson*, 420 U.S. 355, 343 (1975).

Therefore, Petitioner urges that the Court of Appeals erred in finding that Petitioner's request for a new trial permitted his retrial since any reading of *Bryan*, *Sapir*, and *Forman* suggests that the logical consequence of an appellate finding that there was insufficient evidence to convict should be no different from a directed verdict of acquittal at trial: in either case the double jeopardy clause bars retrial of a defendant for the same offense.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded with directions that Petitioner's conviction for first degree murder be overturned.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-6617

RICHARD AUSTIN GREENE,

Petitioner,

vs.

RAYMOND D. MASSEY, Superintendent,
Union Correctional Institution,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

BRIEF OF THE MERITS

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OTHER AUTHORITY

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 76-6617

RICHARD AUSTIN GREENE,

Petitioner,

RAYMOND D. MASSEY, Superintendent
Union Correctional Institution,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Florida Supreme Court which reversed Petitioner's conviction was rendered on November 5, 1968. See Sosa and Greene v State, 215 So. 2d 736 (Fla. 1968). The opinion which denied a writ of prohibition

was rendered on April 17, 1970. See Sosa and Greene v Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970). The opinion which considered Petitioner's second conviction after his retrial was rendered on October 25, 1974. See Greene and Sosa v State, 302 So. 2d 202 (Fla. 4th DCA 1974). The unreported opinion of a denial of habeas corpus relief was rendered on February 24, 1976. The opinion of the Fifth Circuit Court of Appeals affirming a denial of habeas relief was rendered on January 26, 1977. See Greene v Massey, 546 F. 2d 51 (5th Cir. 1977).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

> No person shall "be subject for the same offense to be twice put in jeopardy of life or limb..."

AMENDMENT XIV

> Section 1."... (N)or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within

its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 2254. State Custody; remedies in Federal courts

(a) "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Florida Appellate Rule 6.16 (b)

"Upon an appeal by the defendant from the judgment the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal. Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

QUESTION PRESENTED

Whether or not federal habeas corpus review of a Fifth Amendment claim of double

jeopardy is precluded where a defendant waives his defense of double jeopardy by successfully appealing a conviction, and received an opportunity for full and fair consideration of a Fifth Amendment claim in a state court?

STATEMENT OF THE CASE

Sosa and Greene were tried and found guilty of murder in the first degree in November, 1965, and sentenced to death. An appeal was taken to the Florida Supreme Court in Sosa and Greene v State, 215 So. 2d 736 (Fla. 1968), and on appeal, the Florida Supreme Court in a four to three decision reversed the judgments of conviction of the defendants and remanded the case for a new trial. In its opinion the Supreme Court stated as follows:

> "PER CURIAM.
>
> After a careful review of the voluminous evidence here we are of the view that the evidence was definitely lacking in establishing beyond a reasonable

> doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.
>
> It is so ordered." Id., at 737.

See also the concurring opinion, as joined in by the Justices, for the reasons for the reversal of the convictions. Sosa and Greene v State, 215 So. 2d at 742-746.

After remanding the case for a new trial, Petitioner and Sosa filed a suggestion for a writ of prohibition in the trial court claiming that trying the defendants again for murder in the first degree would be violative of the principles of double jeopardy. The trial court denied the motion, and defendants appealed the decision to the Second District Court of Appeal in Sosa and Greene v Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970). In Sosa and Greene v Maxwell, the prohibition was denied

and the case remanded for a new trial on the charge of murder in the first degree. Defendants appealed to the United States Supreme Court and certiorari was denied. Sosa and Greene v Maxwell, 402 U.S. 951, 91 S.Ct. 1617, 29 L Ed 2d 121 (1971).

Upon retrial in 1972, Sosa and Greene were convicted of murder in the first degree, and sentenced to life imprisonment. An appeal was taken to the Fourth District Court of Appeal in Greene and Sosa v State, 302 So. 2d 202 (Fla. 4th DCA 1974), which held that the doctrine of res judicata was dispositive of the case. Writ of certiorari was again applied for and denied by the United States Supreme Court. Greene and Sosa v State, 421 U.S. 932, 95 S.Ct. 1660, 44 L Ed 2d 89 (1975).

Petitioner-Greene applied for relief in a federal habeas corpus proceeding in the United States District Court, Middle District,

Orlando, Florida Division, and relief was denied. An appeal was taken to the Fifth Circuit Court of Appeal in Greene v Massey, 546 F. 2d 51 (5th Cir. 1977), where relief was denied. Certiorari was granted by the United States Supreme Court on June 20, 1977.

SUMMARY OF ARGUMENT

One basic issue is raised by the instant appeal: Where a defendant successfully appeals a conviction, may a defendant plead double jeopardy in defense of a retrial after he received an opportunity for full and fair consideration in the state courts.

No question exists in the instant case in that Petitioner had an opportunity for full and fair consideration of his Fifth Amendment claim by a competent and unbiased state tribunal. Florida provides its defendants with avenues of review of federal constitutional claims, which are equivalent

to the federal statutes. Additional review by federal courts of Petitioner's double jeopardy claim is unnecessary and unwarranted.

It is fundamental in our nation's jurisprudence that a person may be retried for an offense when a conviction is set aside without running afoul of the principles of double jeopardy. A federal statute, 28 U.S.C. §2106, allows an appellate court to reverse and remand for a new trial, and some 30 state statutes, including Florida, permit retrial after a successful appeal on grounds of insufficiency of the evidence and others. The national reporters contain an infinite number of cases, where an appellate court reverses a conviction on grounds of insufficiency of the evidence and others. No double jeopardy violation exists when a defendant obtains a reversal of a conviction and is retried.

ARGUMENT

FEDERAL HABEAS CORPUS REVIEW OF A FIFTH AMENDMENT CLAIM OF DOUBLE JEOPARDY IS PRECLUDED WHERE A DEFENDANT RECEIVED AN OPPORTUNITY FOR FULL AND FAIR CONSIDERATION OF A FIFTH AMENDMENT CLAIM IN THE STATE COURT, AND DEFENDANT WAIVED HIS DEFENSE OF DOUBLE JEOPARDY BY SUCCESSFULLY APPEALING A CONVICTION AND THE ENDS OF PUBLIC JUSTICE ARE MET BY RETRIAL.

A

WHERE THE STATE HAS PROVIDED A PRISONER WITH AN OPPORTUNTIY FOR FULL AND FAIR CONSIDERATION OF A FIFTH AMENDMENT CLAIM, FEDERAL HABEAS CORPUS REVIEW SHOULD BE PRECLUDED.

Where a defendant had an opportunity to fully and fairly litigate a federal constitutional claim in the state courts, federal habeas corpus review is precluded on the claim. See Sykes v Wainwright, ___U.S.___, 97 S.Ct ___, 51 L Ed 2d ___ (1977); Swain v Pressley, ___U.S.___, 97 S. Ct 1224, 51 L Ed 2d 411 (1977); Stone v Powell and Wolff v Rice, ___U.S.___, 96 S. Ct. 3037, 49 L Ed 2d 1067 (1976); Francis v Henderson, 425 U.S.

536, 96 S.Ct. 1708, 48 L Ed 2d 149 (1976); Estelle v Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L Ed 2d 126 (1976).

Historically, the limitation of federal habeas corpus jurisdiction to a consideration of the "jurisdiction" of the sentencing court existed until Frank v Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L Ed 969 (1914), where this Court affirmed a denial of habeas relief because the petitioner's claims had been considered by a competent and unbiased state tribunal. This Court in Frank also indicated that where a state failed to provide a corrective process for full and fair consideration of federal claims, a federal court may review the merits to determine whether a conviction was lawful and proper.

In the cases of Brown v Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L Ed 469 (1953), and Fay v Noia, 372 U.S. 391, 83 S.Ct. 822, 9

L Ed 2d 837 (1963), the scope of the writ appeared to be expanded to include all types of federal constitutional claims. This Court, without discussion, continued to accept jurisdiction in all types of cases alleging unconstitutional restraint, where the issue of the scope of habeas corpus jurisdiction was not raised until this Court decided Stone v Powell and Wolff v Rice, ___U.S.___, 96 S.Ct. 3037, 49 L Ed 2d 1067 (1976). In Stone, this Court held:

> "...we conclude that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application ofthe rule persist with special force." 49 L Ed 2d at 1088.

In a more recent decision by this Court, in Swain v Pressley, ___U.S.___, 97 S.Ct. 1224, 51 L Ed 2d 411 (1977), this Court held that a District of Columbia parallel post-conviction remedy could be substituted for federal habeas, where the collateral remedy was neither inadequate nor ineffective. In holding that the Constitution does not mandate collateral review of convictions, this Court further indicated in a concurring opinion:

> "Since I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction, I see no issue of constitutional dimension raised by the statute in question." Id. ___U.S.___, 51 L Ed at 423.

The adoption of Florida Rule of Criminal Procedure 3.850 (1973), 1.850 (1967), was a direct result of this Court's decision in Gideon v Wainwright, 372 U.S.335, 83 S.Ct.

792, 9 L Ed 2d 799 (1963). See Roy v Wainwright, 151 So. 2d 825 (Fla. 1963). Florida's rule is similar to the federal motion to vacate, 28 U.S.C. §2255, and may be entertained when a defendant alleges unlawful prejudice or denial of constitutional rights so as to render a judgment vulnerable to collateral attack. See Gayle v State, 265 So. 2d 389 (Fla. 2nd DCA 1972), Estrella v State, 215 So. 2d 489 (Fla. 3rd DCA 1968) (allegation of coerced confession); Gil v State, 311 So. 2d 154 (Fla. 3rd DCA 1975) (denial of preliminary hearing); Nelson v State, 281 So. 2d 49 (Fla. 3rd DCA 1973) (suggestive identification); Blackburn v State, 286 So. 2d 30 (Fla. 3rd DCA 1973), Robinson v Wainwright, 240 So. 2d 65 (Fla. 2nd DCA 1970) (claim of double jeopardy); Mears v State, 232 So. 2d 749 (Fla. 3rd DCA 1970) (pretrial publicity and right to fair trial).

Florida's post conviction procedures provide both an available and adequate remedy for a prisoner in custody seeking relief on the basis of constitutional issues. See Fitzgerald v Wainwright, 440 F. 2d 1049 (5th Cir. 1971). See also Gaines v Rickets, 554 F. 2d 1346 (5th Cir. 1977).

Petitioner's channel of review in the Florida state courts on his double jeopardy claim included an opportunity to raise the issue in a Rule 3.850 Motion to Vacate Judgment and Sentence. Double jeopardy claims remain subject to attack in Florida by filing a pretrial motion to dismiss, suggestion for writ of prohibition, and a Motion to Vacate Judgment and Sentence. See Strawn v State ex rel. Anderberg, 332 So. 2d 601 (Fla. 1976); Florida Rule of Criminal Procedure 3.190 (b) (1973), 1.190 (b) (1967); Blackburn, Robinson. While arguing his double jeopardy claim in a

writ of prohibition before retrial,[1] and upon direct appeal after retrial, Petitioner had the opportunity for full and fair consideration in the state courts as his double jeopardy claim was repeatedly considered. See Sosa and Greene v Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970); Sosa and Greene v State, 302 So. 2d 202 (Fla. 4th DCA 1974). Although Petitioner's claim was not considered by collateral attack in a Rule 3.850 Motion to Vacate Judgment and Sentence, Petitioner had the opportunity to raise the double jeopardy claim for additional review and still does.

1/ It is worth noting that Francis, Williams, and Sykes, may altogether preclude federal habeas review for failure to follow a state procedural rule. Various evidentiary questions were argued on direct appeal, and no Rule 1.190 (b) (3.190 (b)), Florida Rule of Criminal Procedure, motion to dismiss was filed arguing the double jeopardy claim before retrial. See also Wainwright v O'Berry, 546 F. 2d 1204 (5th Cir. 1977).

Under 28 U.S.C. §2254 (d), Congress provided that a state court's adjudication is presumptively correct, and that the burden rests on the petitioner to establish that the state proceedings were not full and fair. See Cranford v Rodriquez, 512 F. 2d 860 (10th Cir. 1975); United States v Cannon, 508 F. 2d 197 (7th Cir. 1974); Souza v Howard, 488 F 2d 462 (1st Cir. 1973); Braxton v Wainwright, 473 F. 2d 1371 (5th Cir. 1973); Crow v Eyman, 459 F. 2d 24 (9th Cir. 1972); United States v LaVallee, 418 F. 2d 437 (2nd Cir. 1969); Maxwell v Turner, 411 F. 2d 805(10th Cir. 1969); United States v Pate, 375 F. 2d 289 (7th Cir. 1967). Where the federal question was considered in a state proceeding not subject to challenge under the guidelines of 28 U.S.C. §2254 (d), no relitigation of the question by means of a hearing is required. See Franklin v Wyrick, 529 F. 2d 79 (8th Cir.

1976); Velleca v Superintendent, M.C.I. Walpole, 523 F. 2d 1040 (1st Cir. 1975); United States v LaVallee, 504 F. 2d 580 (2nd Cir. 1975); Turner v Craven,476 F. 2d 769 (9th Cir. 1973); Farmer v Caldwell, 473 F. 2d 72 (5th Cir. 1973); United States v New Jersey, 434 F. 2d 649 (3rd Cir. 1970).

Federal court reliance on state courts determinations has long been a part of the federal-state court constitutional balance of federalism. The United States Supreme Court has repeatedly held that state court determinations of state law binds the federal courts. See Scripto, Inc. v Carlon, 362 U.S. 207, 80 S.Ct. 619, 4 L Ed 2d 660 (1960); Murdock v Memphis, 20 Wall. 590, 22 L Ed 429 (1875). The federal courts have properly followed the Supreme Court's precedent, and have treated questions of state law as improper for consideration in habeas corpus

proceedings. See Buccanan v Wainwright, 474 F. 2d 1006 (5th Cir. 1973); Adams v Wainwright, 445 F. 2d 832 (5th Cir. 1971); Holloway v Wainwright, 445 F. 2d 149 (5th Cir. 1971); Anderson v Nassau, 438 F. 2d 183 (5th Cir. 1971).

The corrective process granted by Florida provided adequate channels of consideration of Petitioner's double jeopardy claim. Petitioner has not challenged, nor has he in any way intimated that state channels of consideration were inadequate or ineffective; instead, all that Petitioner argues is that 28 U.S.C. §2254 should be used to relitigate and reconsider his double jeopardy claim, and that the result which was reached by the state courts was incorrect. No claim has been made that Florida's process of adjudicating Petitioner's claim was incomplete or unfair. Instead, Petitioner

repeatedly received full and fair consideration of his Fifth Amendment claim of double jeopardy in Florida.

In Stone, this Court considered and rejected petitioner's claims that state courts were ineffective to litigate federal constitutional claims and stated:

> "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. Martin v Hunter's Lessee, 14 US (1Wheat) 304, 341-344, 4 L Ed 97 (1816). Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive....In sum, there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned than his neighbor in the state courthouse.'" Id., ___U.S.___, 49 L Ed 2d at 1087-1088, fn 35.

Petitioner's Fifth Amendment claim was repeatedly considered by the state courts. See Sosa and Greene v Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970); Greene v State, 302 So. 2d 202 (Fla. 4th DCA 1970). Federal standards were applied to Petitioner's double jeopardy claim by the state courts. At no time has Petitioner challenged the fairness or adequacy of consideration he received in the state courts, which provided him with an adequate corrective process and forum. Further review in a federal court of Petitioner's double jeopardy claim is unnecessary and inappropriate. Nothing in the Constitution requires a prisoner to have his constitutional claims repeatedly considered by more than one tribunal where state procedures are adequate and competent, nor is there a constitutional right to an appeal. See McKane v Durstan, 153 U.S. 684, 14 S.Ct. 913,

38 L Ed 867 (1894); §924, Florida Statutes (1975). See also Abney v United States, ___, U.S.___, 97 S.Ct.___, 52 L Ed 2d 651 (1977). While the federal habeas corpus statute existed in order to review state adjudications, habeas corpus review is not of constitutional dimensions, and what the legislature has given it may take away. See Swain, 51 L Ed 2d at 419, fn 13; Ex parte Yerger, 75 U.S. (8 Wall.) 85, 19 L Ed 332, 338-339 (1869). The Supreme Court's decision in Stone was consistent with the federal courts interpretation of the federal habeas corpus statute. Further review of Petitioner's Fifth Amendment claim is unwarranted and unnecessary.

B

WHERE A DEFENDANT SUCCESSFULLY APPEALS A CONVICTION, THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR RETRIAL.

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb...." Amendment V, United States Constitution. The double jeopardy provision of the United States Constitution has been interpreted as having two distinctive inquires: (1) whether jeopardy has attached in the proceeding; (2) if jeopardy has attached, is reprosecution nonetheless permitted by reason of "manifest necessity" or to meet the "ends of public justice." See United States v Sanford, ___U.S.___, 97 S. Ct. 20, 50 L Ed 2d 17 (1976); Illinois v Sommerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L Ed 2d 425 (1973); United States v Perez,

22 U.S. (9 Wheat.) 579, 6 L Ed 165 (1824).

Granting a mistrial sua sponte and without defendant's consent out of regard for a defendant's interest is permissible and does not violate the provisions of the double jeopardy clause upon retrial. See Sanford, Perez; Gori v United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L Ed 2d 901 (1961). Since 1824, it has been settled that the double jeopardy clause of the Fifth Amendment does not preclude a retrial for reasons deemed compelling and to meet the ends of substantial justice. See Sanford, Gori, Perez.

When a jury finds a defendant not guilty of the charge, the prosecution may not retry that defendant on the acquitted charge to gain a conviction without running afoul of the double jeopardy clause. See United States v Martin Linen, ___U.S.___, 97 S.Ct. 1349, 51 L Ed 2d 642 (1977); Green v United States,

355 U.S. 184, 78 S.Ct. 221, 2 L Ed 2d 199 (1957); Ball v United States, 163 U.S. 662, 16 S.Ct. 1192, 41 L Ed 300 (1896).

It is well settled in the law that a person may be retried for an offense where the prior conviction for that offense is set aside on appeal, whether the grounds be insufficiency of the evidence or the prosecution's error, see Yates v United States,354 U.S. 298, 77 S.Ct. 1064, 1 L Ed 1356 (1957); Forman v United States, 361 U.S. 416, 80 S.Ct. 481, 4 L Ed 2d 412 (1960); Sapir v United States, 348 U.S. 373, 75 S.Ct. 422, 99 L Ed 426 (1955); Bryan v United States, 338 U.S. 552, 70 S.Ct. 317, 94 L Ed 335 (1950); Abney v United States, ___U.S.___, 97 S.Ct. ___, 52 L Ed 2d 651, 663-664 (1977), and whether or not a defendant moves for a new trial upon conviction. See United States v Koonce, 494 F. 2d 1269 (9th Cir. 1974);

Sapir v United States, 348 U.S. 373, 75 S.Ct. 422, 99 L Ed 2d 426 (1955), where this Court, as per Mr. Justice Douglas, stated that had petitioner asked for a new trial, he opens the whole record for such disposition as might be just. Where a defendant moves for a new trial in the trial court, he has asked that his conviction be set aside, and the double jeopardy clause does not bar retrial.

The leading case construing the power of federal appellate courts to reverse a judgment of conviction pursuant to 28 U.S.C. Section 2106 is Bryan v United States, 338 U.S. 552, 70 S.Ct. 317, 94 L Ed 335 (1950). In Bryan, the defendant was convicted of two counts of attempt to evade the income tax laws. The defendant moved for a judgment of acquittal at the end of the government's case and all the evidence. Both motions were denied. After a guilty verdict

the defendant again moved for a judgment of acquittal, or in the alternative for a new trial, which were denied. The Court of Appeals reversed the judgment of conviction and remanded the case for a new trial, because it found the evidence adduced at trial insufficient to sustain the conviction. An appeal was taken to the United States Supreme Court by the defendant cla[illegible]g that a judgment of acquittal should have been entered at trial.

In rejecting the defendant's argument that requiring him to again stand trial would constitute a violation of the principles of double jeopardy, this Court held that when an accused successfully appeals his conviction, the fifth amendment does not bar retrial. In addition, this Court announced that once a defendant appealed a conviction an appellate court became vested with broad discretion,

pursuant to 28 U.S.C. Section 2106 in determining what was an appropriate judgment under the circumstances.

The power of federal appellate courts was further defined in Forman v United States, 361 U.S. 416, 80 S.Ct. 481, 4 L Ed 2d 412 (1960), where an instruction was given by the trial court upon defendant's request and without objection of the government. Defendant was convicted, and upon his appeal the Court of Appeals reversed the conviction and directed the trial court to enter a judgment of acquittal. On rehearing, the Court of Appeals modified its original order for acquittal and ordered a new trial since the case might have been tried on an alternative therory. Defendant filed a motion for rehearing, contending that the Court of Appeals exceeded its power and violated the double jeopardy provision of the Fifth Amendment by directing

a new trial.

This Court held that the Court of Appeals order directing a new trial did not violate the double jeopardy provision of the Fifth Amendment, and further indicated:

> "Under 28 U.S.C. Section 2106, the Court of Appeals has full power to go beyond the particular relief sought...when (petitioner) opened up the case by appealing from his conviction, he subjected himself to the power of the appellate court to direct such 'appropriate' order as it thought just under the circumstances." Id., at 425-426.

By a comparable state statute, the Florida Supreme Court has review power at least equal to that possessed by this Court under 28 U.S.C. Section 2106. Florida Appellate Rule 6.16 (b) grants Florida appellate courts the power to review the sufficiency of the evidence to determine if it is insufficient to support the judgment and if the "interests of justice" require a new trial. In Tibbs v State of Florida, 337 So. 2d 788

(Fla. 1976), the Florida Supreme Court cited as its authority to review convictions for which the death penalty has been imposed, Florida Appellate Rule 6.16 (b). The rule exists as an offshoot of Florida's zealous defense of life and liberty in death penalty cases. See Proffitt v Florida, ___U.S.___, 96 S.Ct.___, 49 L Ed 2d 913, 922-926 (1976).

In Florida, as well as other jurisdictions, state statutes universally allow the prosecution to retry an accused upon a successful appeal for grounds of insufficiency of the evidence and others. See Ala. Crim. Code, tit. 15, §§ 389-391 (1959); Ariz. Rev. Stat. Ann., §13-1716 (1956); Calif. Penal Code, §1260-1262 (West 1970); Hawaii Rev. Stat., tit. 35, §641-16 (Supp. 1974); Idaho Crim. Code, ch.28, §§19-2803, 19-2821 to 2822 (1948); Mass. Ann. Laws, ch.278, §29 (1972), ch. 211, §8 (1958); Mo. Rev. Stat., §22-3605

(1974); Nebr. Rev. Stat., §29-2308 (1975); N.Y. Crim. Code, §470.15 (McKinney 1971); N.D. Rev. Code, § 29-28-28 (1974); Ill. Stat. Ann., tit 110A, §615 (1976); Pa. Stat.Ann., tit 19, §§1185 to 7 (1964); Ind. Stat. Ann., tit. 35, §35-1-47-10 (1975); Kans. Stat. Ann., §22-3605 (1974); Ohio Page's Rev. Code, §2953.07 (1973); Okla. Stat. Ann., tit. 22 §1066 (1958); W.Va. Code, §58-5-25 (1966); Iowa Code Ann., §793.18 (Supp. 1977); Ky. Rev. Stat. §21.055 (1971); Md. Code Ann., Md. Rules Pr., Rules 1070 to 1074, 1086 (1977); Mich. Stat. Ann., §§28.1096, 28.1098, 28.1121 (1972); Minn. Stat. Ann., Rules of Civil and Crim. Pr., Rule 29.02 (12) (13) (Supp. 1976); Miss. Crim. Code, §§99=35-133, 99-35-139 to 99-35-143 (1973); Mont. Rev. Stat. Ann. §§95-2404, 95-2412, 95-2426, 95-2430 (1947): Nev. Rev. Stat., §§177.225 to 177.305 (1973); N.Mex. Stat. Ann., ch. 41-15-5 (1953); N.C. Crim.

Code Ann., §§15-173.1, 15-174, 15-180 (1969); Oregon Rev. Stat., §157.065 (1975); S.D. Laws Ann., §§23-51-18 to 23-51-20 (1967); Tex. Stat. Ann. Code of Crim. Pr., Art.44.24, 44.25, 44.29 (1966); Utah Code of Cr. Pr., §§77-42-2 to 77-42-7 (1953); Va. Crim. Code, §19.2-324 (1975); 28 U.S.C. §2106 (1973). See, for example, Gray v State of Maryland, 255 A2d 5 (Md. Ct. App. 1969); United States v Musquiz, 445 F. 2d 963 (5th Cir. 1971); Yates v United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L Ed 2d 1356 (1957);Koonce.

Where the weight of the evidence is weak, though technically sufficient to sustain a motion for acquittal and a conviction, an appellate court in Florida may reverse and order a new trial to meet the ends of public justice. See Tibbs v State, 337 So. 2d 788 (Fla. 1976); Askew v State, 118 So. 2d 219 (Fla. 1960); Lowe v State, 19 So. 2d 106

(Fla. 1944); Fla. App. Rule 6.16 (b).

In an analogous situation, where a defendant requests a mistrial because of the prosecution's error, or moves to dismiss an information during trial, the double jeopardy clause does not bar retrial. See Lee v United States, ___U.S.___, 97 S.Ct. 2141, 52 L Ed 2d ___, (1977); United States v Dinitz, ___U.S. ___, 96 S.Ct. 1075, 47 L Ed 2d 267 (1976). In this Court's most recent indication on whether retrial is permitted where defense counsel moves for a new trial, in Lee, after a jury was sworn, defendant's counsel moved to dismiss the information on the ground that it failed to allege specific intent. At the close of the evidence, the trial court observed that defendant's guilt had been proved beyond a reasonable doubt, and granted the motion to dismiss. Defendant was charged and convicted in a second trial. This Court held

that the order entered by the trial court was indistinguishable from a declaration of mistrial, which contemplates reprosecution of a defendant.

In Dinitz, the defendant's main counsel was repeatedly cautioned by the trial judge about his opening argument. Persisting in his conduct, he was banished from the courtroom. The trial judge then requested his co-counsel, who was unprepared to go to trial, to proceed. The next day, co-counsel informed the court that the defendant wanted his main counsel to try the case. The trial judge set three alternatives that might be followed--a stay of the proceedings pending application to the court of appeals, continuation of the trial with defendant's co-counsel trying the case, or declaration of a mistrial. Co-counsel shortly moved for a mistrial.

The Supreme Court of the United States

indicated that while the defendant was faced with a "Hobson's choice" in moving for a mistrial, the defendant waived a defense of double jeopardy by moving for a mistrial:

> "...a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error... If such circumstances, the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial, judicial or prosecutorial error. The important consideration for purpose of the Double Jeopardy Clause, is that the defendant retains primary control over the course over the course to be followed in the event of such error." Id., ___U.S.___, 47 L Ed 2d at 274-275.

When Petitioner moved for a new trial upon conviction in the trial court, the situation was similar to a request for a mistrial: Petitioner waived his double jeopardy defense by asking that his conviction be reversed. See Sapir, Bryan. See also Schulhafer,

Jeopardy and Mistrials, 125 UPa. L Rev. 449, 457 (1977).

In reviewing the Florida Supreme Court's reversal of Petitioner's case in Sosa and Greene v State, it is clear that while the state court indicated that "the evidence was definitely lacking in establishing beyond a reasonable doubt" that the defendants were guilty, the Florida Supreme Court believed that there existed an evidentiary error by testimony adduced at the first trial, and that at most, the weight of the evidence, though technically sufficient to withstand a motion for acquittal at trial and a conviction, was weak and that the ends of public justice would best be served by granting defendant a new trial:

> "We come now to the critical question of whether reversible error was committed by the introduction into evidence of certain extrajudicial state - ments of two witnesses for the state."

* * * * * *

"Under the circumstances described above, the introduction of additional evidence in the form of extrajudicial statements incurs the danger that the jury will be inclined to consider the probative weight of such additional extrajudicial evidence solely for the purpose of establishing the substance of facts asserted therein, rather than bearing on the issue of corroboration."

* * * * * *

"For the reasons stated the judgments should be reversed and remanded for a new trial so we have agreed to the Per Curiam order doing so." Id., at 742-746.

In United States v Wiley, 517 F. 2d 1212 (D.C. Cir. 1975), the federal court reversed the conviction because the prosecution failed to present a prima facie case at trial, and relied upon its authority under 28 U.S.C. §2106, which grants an appellate court discretion to enter an appropriate judgment under the circumstances. However, the federal court

in Wiley indicated:

> "There are cases in which the appellate court will use words of insufficiency of evidence when the more accurate analysis of the reversal is a determination that a retrial would be just and appropriate because the conviction was in the teeth of minimally sufficient evidence; such cases would fall within the exceptions that permit trial." Id., at 1219-1220. (Emphasis supplied).

The Supreme Court in Sosa and Greene v State, by reversing the case and ordering a retrial, felt that the ends of public justice would best be served in light of the conviction for first degree murder and the sentence of death. No prejudice emanated from Petitioner's retrial in the state court since his sentence was mitigated to life. See Dobbert v Florida, ___U.S.___, 97 S.Ct. ___, 52 L Ed 2d___, (1977); North Carolina v Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L Ed 2d 656 (1969).

From the standpoint of an appellate court, and a defendant, there are strong policy reasons

in favor of allowing an appellate court the option of reversing the case for a new trial, directing the trial court to enter a judgment of acquittal, or entering a judgment of conviction for a lesser included offense. First, by the time the conviction reaches the appellate court, the judgment has withstood numerous motions by defendant's counsel before, during, and after the trial. In addition, a jury has accepted the prosecution's case and rejected the defendant's case. By the time an appellate court considers the matter, two separate entities--a judge and jury--have decided the controversy adverse to defendant. If the prosecution could supplement its case on retrial, then the appellate court may remand the case to the trial court. This would allow the defendant another opportunity to test the prosecution's case after one judge and jury have pronounced guilt and the prosecution would have an opportunity to determine

whether or not the accused is guilty of the crime and should be punished accordingly.

A second argument in favor of granting a retrial when an appellate court reverses because insufficient evidence was adduced at trial is that appellate courts would hesitate to reverse cases in which retrial would be prohibited on the grounds of double jeopardy. Such a "fairness approach" was announced by the Supreme Court in United States v Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L Ed 2d 448 (1964), where this Court stated:

> "From the standpoint of a defendant it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution." Id., 377 U.S. at 466.

When Petitioner appealed his conviction assigning a number of alleged errors, including admitting various admissions against

Petitioner's interest into evidence at trial, which were part of the prosecution's case in chief, there was no defense of double jeopardy when the appellate court grants a new trial upon reversal.

CONCLUSION

Petitioner's federally guaranteed constitutional rights were protected by the state courts in these proceedings. No valid double jeopardy defense exists where a defendant successfully obtained a reversal of his conviction and was subsequently retried. Both federal and state law permit the prosecution to retry a defendant upon a successful appeal.

Dated: West Palm Beach, Florida,
August 11, 1977

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I furnished three (3) copies of the foregoing brief to counsel for Petitioner, Honorable John T. Chandler, Florida Legal Services, Inc., Prison Project, 2614 S.W. 34th Street, Gainesville, Florida 32608, by mail, this the _____ day of August, 1977.

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FOR ARGUMENT

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-6617

RICHARD AUSTIN GREENE,

Petitioner,

vs.

RAYMOND D. MASSEY, Superintendent
Union Correctional Institution,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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CITATIONS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the order of the United States District Court for the Middle District of Florida is reported as Greene v. Massey, 546 F.2d 51 (5th Cir. 1977), and is contained in the appendix. The order of the District Court dismissing the petition for writ of habeas corpus is unreported but is contained in the appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1977. The petition for a writ of certiorari was filed on April 23, 1977, and granted on June 20, 1977. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States, Amendment XIV, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Did the Court of Appeals err in finding that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution did not bar retrial of Defendant for first degree murder after the Florida Supreme Court found that the evidence was insufficient to prove the commission of that offense?

STATEMENT OF THE CASE

Petitioner, Richard Austin Greene, along with Joseph Manuel Sosa, was found guilty in a Florida state jury trial in 1965 of murder in the first degree. During that proceeding, counsel for Petitioner made a motion for a directed verdict of acquittal and a motion for new trial. Both were denied. Petitioner received the death penalty.

On November 5, 1968, the Florida Supreme Court reversed the conviction. In a per curiam decision, the Florida Supreme Court concluded that:

> [A]fter a careful review of the voluminous evidence here we are of the opinion that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968).

On remand from the Florida Supreme Court's reversal, Petitioner obtained a transfer of venue for his retrial to the Circuit Court of Orange County, Florida. Petitioner's request for a writ of prohibition based on the contention that his retrial for first degree murder would constitute double jeopardy was denied by the State trial court and, upon appeal of the denial, the appellate court affirmed. Sosa v. Maxwell, 234 So. 2d 690 (2d DCA Fla. 1970).

Upon retrial, Petitioner was again convicted of first degree murder, but with a recommendation for mercy. Petitioner was sentenced to life imprisonment which he has been serving continuously to date.

Petitioner appealed to the Fourth District Court of Appeal of Florida on the ground that his retrial for the same offense after the Florida Supreme Court had found the evidence at his first trial insufficient to establish his guilt beyond a reasonable doubt placed him in double jeopardy. The Fourth District Court of Appeal affirmed his conviction. Sosa and Greene v. State, 302 So. 2d 202 (4th DCA Fla. 1974). A petition for a writ of certiorari reiterating the double jeopardy claim was denied by the United States Supreme Court. Greene v. Florida, 421 U.S. 932 (1975).

Thereafter, Petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, urging that the Double Jeopardy Clause bars retrial once a conviction for the same offense is reversed because the trial court erred in not granting acquittal due to insufficient evidence. In its February 1976 order, the District Court intimated that absent prior precedent in the Fifth Circuit it

might have granted Petitioner's request. However, constrained by precedent of Fifth Circuit opinions, the District Court denied the writ.

Petitioner appealed the denial of habeas corpus relief to the United States Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. §2253. The denial of the writ was affirmed because in addition to his motion for acquittal Petitioner had moved for a new trial. Greene v. Massey, 546 F.2d 51 (5th Cir. 1977). The Circuit Court further based its finding that retrial was proper in this case on its interpretation that the federal circuit courts have the power to reverse for retrial in such cases pursuant to 28 U.S.C. §2106 and the Florida Supreme Court has similar power of review.

ARGUMENT

I

FEDERAL HABEAS CORPUS REVIEW OF A FIFTH AMENDMENT DOUBLE JEOPARDY CLAIM IS NOT PRECLUDED AFTER CONSIDERATION OF THAT CLAIM BY A STATE COURT

Respondent urges that where the state has provided a full and fair consideration of a federal constitutional claim further review by federal habeas corpus is precluded. This, of course, is not the state of the law as established by this Court. Stone v. Powell, ____U.S.____, 96 S.Ct. 3037 (1976). Indeed, the holding in Stone is expressly limited to Fourth Amendment claims:

> We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

96 S.Ct. at 3045-3046 (Emphasis added). Clearly, the opinion is limited to Fourth Amendment claims. In fact the majority opinion reassured those members of the Court who forsaw substantial evisceration of federal habeas corpus jurisdiction by replying thusly:

> With all respect, the hyperbold of the dissenting opinion is misdirected. Our decision today is not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, see, pp. 3047-3048, supra, and we emphasize the minimal utility of the rule when sought to be applied to the Fourth Amendment claims in a habeas corpus proceeding.

Id. at 3052 n.37.

Further, Congress granted habeas corpus jurisdiction to the federal courts in remedy state court rulings because of which persons were in custody in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. §2254. It is prefectly clear that questions of federal law are to be decided by federal judges when the habeas corpus statute is invoked:

> State Adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.

Brown v. Allen, 344 U.S. 443 (1953). The people having enacted the habeas corpus statute, through their elected representatives, and having mandated that federal judges adjudicate the issues raised thereunder, it would seem inappropriate to diminish, by judicial action, the obvious scope of the statute.

The statute lists eight specific grounds for overturning a state court determination of a factual issue, only one of which is that the applicant failed to receive a full, fair and adequate hearing. 28 U.S.C. §2254(d)(6). The eighth ground empowers the federal court to determine whether the applicant was otherwise denied due process of law, the point being that the legislature intended to protect against an erroneous state determination of a federal constitutional right whether or not there was a full and fair hearing of the issue. 28 U.S.C. §2254(d)(6).

It may very well be true that state judges are as expert in applying federal constitutional standards and as inclined to protect federal constitutional rights as are federal judges. Stone v. Powell, ____U.S.___, 96 S.Ct. 3037, 3051n.35 (1976). But, uniformly logical consistency in applying the federal law, certainly a bulwark in encouraging respect for the law in general, would hardly be feasible with 50 states deciding what the federal law is.

This Court has not chosen to diminish the power of the federal courts to hear, pursuant to the federal habeas corpus statute, claims involving personal constitutional rights. Id. at 3052 n.37. Only those Fourth Amendment claims involving alleged exclusionary rule violations are now precluded from review if there has been a full and fair state

hearing. Id. This is because as opposed to being a personal constitutional right, the exclusionary rule is a court-created rule, the redetermination of which by a federal court after full and fair state hearing, has no bearing on the basic justice of the applicant's trial and incarceration. Id. at 3050n. 31. In such cases, the federal court would be deciding de novo, the facts already determined by the various state courts.

It is hardly arguable that any but the state's courts alone can properly determine the meaning and application of its own law, even should other courts engage in such judgments. Similarly, under the federal habeas corpus statute the Congress seemingly has deemed that the federal courts, not the state courts, are the proper arbiters in deciding the application of federal law, for as this Court has said:

> [N]o binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Brown v. Allen, 344 U.S. 443, 508 (1953).

No degree of state court litigation, no matter how fair or how extensive, should be left to stand free from habeas review after a state has erroneously determined that it has not violated an applicant's constitutional rights in trying him and placing him in custody. See Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953).

Petitioner, Richard Greene, alleges that the State of Florida violated his right not to be twice in jeopardy for the same offense. This claim involves a personal constitutional right. United States Constitution, Amendment V. It is therefore a claim properly determined by federal courts under the federal habeas corpus statute. Stone v. Powell, ____ U.S. ____, 96 S.Ct. 3037 (1976); Greene v. Massey, 546 F.2d 51 (5th Cir. 1977) (Appendix at 8-9n.6). Further, the application of the double jeopardy clause to this case is a determination of federal law and, as such, is properly cognizable pursuant to 28 U.S.C. §2254. Id.

II

THE DOUBLE JEOPARDY CLAUSE BARS RETRIAL OF A DEFENDANT FOR THE SAME OFFENSE AFTER AN APPELLATE COURT REVERSES A CONVICTION BECAUSE OF INSUFFICIENT EVIDENCE

In his reply brief, Respondent makes much of the double jeopardy clause as it affects retrial of a defendant after a mistrial has been declared. The mistrial situation sheds little light on the proper disposition to be made of Petitioner's claim, for in a mistrial situation neither the jury, the trial judge nor the appellate court has finally determined whether the defendant was guilty or not guilty under the evidence presented at trial. In Petitioner's case, however, the Florida Supreme Court, without equivocation of any kind, stated in its per curiam decision that

> After a careful review of the voluminous evidence here we are of a view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree, and that the interests of justice require a new trial. The judgments are accordingly reversed and remanded for a new trial.

Sosa v. State, 215 So. 2d 736, 737 (Fla. 1968). (Emphasis added). In addition to the insufficiency of the evidence, one judge elaborated on a number of reversible errors occuring in Petitioner's trial. Id. at 747 (Ervin, J., concurring specially).

The threshhold issue is whether an appellate court's finding of insufficient evidence is entitled to be considered under the same double jeopardy principles as a trial court's finding of insufficient evidence. Petitioner urges that in both cases a defendant is entitled to a directed verdict of acquittal. In both cases the evidence has been found to be insufficient to convict.

If the trial court directs acquittal after a jury verdict of guilty defendant cannot be retried. See

United States v. Wilson, 420 U.S. 332 (1975). This is because the purpose of the Double Jeopardy Clause is to protect a person from being subjected to multiple trials. Id. at 343. See, also, Green v. United States, 355 U.S. 184 (1957). In Green, the principle was stated thusly:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.

355 U.S. at 187. This underlying principle of the Double Jeopardy Clause to prevent multiple trials has been reaffirmed in the latest rulings of this Court. See, United States v. Martin Linen Supply Company, _____U.S._____, 97 S.Ct. 1349, 1353 (1977); United States v. Jenkins, 420 U.S. 358 (1975); United States v. Wilson, 420 U.S. 332 (1975).

Respondent cites various state and federal statutes and court rules as being a sound basis for retrying a defendant whose conviction is overturned because the prosecution failed to present sufficient evidence to convict. See, e.g., Fla. App. R. 6.16(b); 28 U.S.C. §2106. Whether or not such rules and statutes provide for retrial in such cases, these retrials are still unconstitutional. The widespread existence of these rules and statutes does not vitiate violations of the Double Jeopardy Clause which may occur if they are followed. The fact that a federal appellate court may go beyond the relief sought in exercising its power under 28 U.S.C. §2106 is not, as Respondent would have it, a license for a court to order an unconstitutional remedy. See, Forman v. United States, 361 U.S. 416 (1960). See, also, United States v. Wiley, 517 F.2d 1212 (D.C. Cir. 1975). Respondent's reliance upon Forman is ill-placed, since in that case the retrial that was ordered by the court of appeals was not based upon a finding of insufficient evidence. Id. at 425-426.

Respondent argues that Petitioner's request for a new trial in the trial court acted as a waiver of this double jeopardy defense. It appears had he not made that motion retrial for the same offense would have been precluded. See Greene v. Massey, 546 F.2d 51, 55 (Appendix at 12). Certainly, a defendant would rather be retried than have no chance at acquittal at all. But, that is the point: Why should the fact that he made a motion for a new trial have anything to do with the wholly separate consideration of whether the evidence was insufficient to sustain the conviction? See United States v. Wiley, 517 F.2d 1212, 1217 (D.C. Cir. 1975). The interests of justice hardly are served by treating defendants differently because of that fortuitous circumstance.

Respondent further argues that despite its having reversed because "the evidence was definitely lacking in establishing beyond a reasonable doubt" that the defendants were guilty, the Florida Supreme Court really reversed because there existed "an evidentiary error". Brief for Respondent at 34. However, only one justice, concurring specially, discussed the numerous reversible errors occurring in Richard Greene's trial. Sosa and Greene v. State, 215 So. 2d 736, 737-746 (Fla. 1968) (Ervin, J., Concurring specially). His opinion was joined by other members of the court. Id. However, he did join the majority in its per curiam holding that ". . . the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree. . . ." Id. at 737. Thus, the Florida Supreme Court clearly found that not only was there reversible error in the conduct of the trial, but that in addition to that, the evidence adduced was insufficient to convict.

Respondent takes a position that the Florida Supreme Court should not be believed when it said the evidence was insufficient. Rather, Respondent would have this Court find that that court really meant that the evidence was sufficient, but just barely so, so that the interests of justice require a new trial. Brief for Respondent at 37. See United States v. Wiley, 517 F.2d 1212, 1219-1220 (D.C.Cir. 1975). The Florida Supreme Court's holding is plain and unequivocal. To say that that court meant something other than what it said is to indulge in pure speculation. Surely, the protection of a precious constitutional right will not be voided on the premise that if a court's order were unconstitutional for the clear reasons it gives in support thereof, that those reasons will be reinterpreted to justify the result.

Perhaps it should be pointed out that the Florida Supreme Court has recently reversed a murder conviction and remanded for a new trial after a finding which said, "The State simply did carry its burden of proof." McArthur v. State, No. 49,526 (Fla. Sept. 30, 1977). One justice concurred in the reversal, but he dissented as to the portion of the opinion requiring a new trial:

> Although some jurisdictions permit a new trial of an accused person by the government when convictions are reversed due to insufficient evidence, it is my opinion that such action constitutes double jeopardy, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 9 of the Florida Constitution. I therefore would dissent to that portion of the opinion requiring a new trial.

Id. at 13 (Boyd, J., concurring in part and dissenting in part). The Florida Supreme Court, then, has permitted retrial after a clear finding of insufficient evidence to convict on more than one occasion. The McArthur case is a clear example.

> On this record appellant's innocence has not been disproved. Only she knows the truth, and it was and is her constitutional right not to offer her explanation, her demeanor, her candor and her credibility to the jury. The state simply did not carry its burden of proof. Our jurisprudence and the justice of the cause require that the conviction entered below be reversed and that appellant, if the state so elects, be afforded a new trial.

Id. at 12. It is hardly arguable that the Florida Supreme Court does not mean the evidence is insufficient even when they reverse for a new trial since that Court has reversed for a new trial even when there is no question that the evidence was insufficient in the purest sense of that phrase.

Respondent posits that there are strong policy reasons for permitting a new trial after a reversal for insufficient evidence. First, he says, the state's case has withstood numerous trial motions by the defense and the jury has convicted the defendant. That, however, does not mean that the various motions were properly denied as is shown by countless appellate reversals. The fact that the jury has convicted a defendant does not mean that it did so by properly applying the evidence as instructed by the jury as the McArthur case, supra, clearly shows. If the prosecution has failed to make its case after having due opportunity, it is entitled to have no second chance under double jeopardy principles. See United States v. Wilson, 420 U.S. 332, 352 (1975).

Respondent urges that if appellate courts could not remand for a new trial after a finding of insufficient evidence that they would be less likely to reverse a conviction. Judges are only people, but surely they will do their duty when they see it. A defendant is just as surely subjected to double jeopardy by being retried for the same offense after a valid conviction as he is when he is retried after an acquittal. See Id. at 342-343. In such an event, there is

no benefit to society and none to a defendant forced to undergo the ordeal and expense of retrial. In fact, the more often one is tried the more likely it is that one may be found guilty even if one is innocent. See Green v. United States, 355 U.S. 184, 187-188 (1957). The fact that in the second trial Petitioner Greene received a life sentence rather than the death penalty does not correct the injustice done by subjecting him to retrial of the same offense when the evidence presented against him was insufficient to convict him at his first trial.

Respondent would have this Court accept his proposition that somehow the law of Florida allows the appellate courts of the State of Florida to reverse a technically sufficient conviction (one in which there is evidence on all the elements of a crime) and reverse "in the interests of justice" if the appellate court believes the evidence although technically sufficient, is tenuous. Brief for Respondent at 31. This proposition, however, is not recognized in Florida. State v. Smith, 249 So. 2d 16 (Fla. 1971). It is a proposition which the Second District Court of Appeal of Florida utilized in denying Petitioner Greene's application for writ of prohibition to prevent the retrial that is the subject of this cause. Sosa and Greene v. Maxwell, 234 So. 2d 690 (Fla. 2nd DCA 1970). However, when that same court attempted to utilize that theory to reverse a conviction the Florida Supreme Court quashed that Court's order. State v. Smith, 249 So. 2d 16 (Fla. 1971). Therefore, the Florida Supreme Court, recognizing no such theory as Respondent posits, when it reverses for the insufficiency of the evidence, holds that, as a matter of law, the evidence is insufficient to prove the crime. Id.

There can be no doubt that in the case of Petitioner Richard Greene the Florida Supreme Court held that the prosecution failed to carry its burden of proof. Sosa and Greene v. State, 215 So. 2d 736 (Fla. 1968).

Respondent's reliance on United States v. Tateo, 377 U.S. 463 (1964), for the proposition that judges would be less likely to reverse a conviction if the defendant could not be retried is ill-placed. Tateo was concerned with trial error, not the sufficiency of the evidence. Id. Petitioner Greene does not posit that retrial is improper in such cases. Of course it is. E.g., United States v. Wilson, 420 U.S. 332 (1975). Further, if a reversal is obtained upon the insufficiency of the evidence it may be proper to retry a defendant for a lesser included offense. See Green v. United States, 355 U.S. 184 (1957).

Richard Greene was retried for the same offense after the Supreme Court of Florida reversed his conviction because of the sufficiency of the evidence. The evidence being insufficient, his motion for a directed verdict should have been granted. Defendant could not have been retried had the trial court not erred. An appellate finding of insufficient evidence should be accorded the same remedy as such a finding by the trial court on motion for directed verdict. To fail to do so subjects a defendant to multiple prosecutions for the same offense even though the prosecution failed to meet its burden of proof, and this eventuality offends the Double Jeopardy Clause in violation of his Fifth Amendment right not to be twice subjected to jeopardy for the same offense.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the judgment of the court below should be reversed and that Petitioner's conviction for first degree murder be overturned.

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